THE DOCTRINE OF EXCESSIVE FORCE IN SELF-DEFENCE AND THE THEORY OF THE "BATTERED WOMAN SYNDROME" IN THE DEFENCE OF SELF-DEFENCE IN CRIMINAL LAW:

A COMPARATIVE STUDY
OF
ENGLISH, AUSTRALIAN AND CANADIAN CRIMINAL LAW

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I confirm that this is my own work, has been composed by myself, and does not include works submitted for any other degree or professional qualification.

In Memory of my Beloved Father

ABSTRACT

This thesis aims to examine two issues related to the defence of self-defence in criminal law. Firstly, it is an investigation into the theory of excessive force in self-defence. The essence of the theory is to have a person who excessively applies force in his defence to be convicted of manslaughter. The arguments in favour of the theory are compelling; however, in practice, the issue of excessive defence has always been a brain-teaser for judges. This thesis elaborates the controversies surrounding the application of the theory in the courts. The reason for its demise and arguments for its revival are discussed.

Secondly, this work analyses the incorporation of the doctrine of the "battered woman syndrome" into the defence of self-defence. This doctrine has recently been introduced where, upon its acceptance by the court, an accused will be successful in pleading self-defence despite the fact that the traditional requirement of imminence has not been satisfied. There is discussion whether the doctrine has always been necessary for battered woman in claiming self-defence.

This thesis focuses, in the main, on decided cases and, wherever necessary, a comparison is made of the two theories mentioned above in the law of self-defence in England, Australia and Canada.

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CHAPTER ONE

INTRODUCTION

This dissertation is a study of the criminal law defence of self-defence. The term "private defence" is sometimes considered preferable to that of self-defence as it projects more accurately the nature and scope of the defence itself. In essence, the defence of self-defence is claimed by one who kills another, or inflicts harm upon another in protecting his own life or bodily integrity, in defending the life of others - whether one's family members or a complete stranger - or in defending his property. Whether the defence is one of "justification" or "excuse" is a matter of debate, but the majority of the lawyers prefer to classify it under the theory of "justification". In relation to the arguments of "justification" and "excuse", even though not denying its significance for the theoretical aspects of the defence, I would rather incline to the view that the discussion is of little legal practicality. After all, it is the final outcome of the defence which matters most to those who seek to invoke the defence.

The most important aspect of the defence is the fact that if it is successfully pleaded the accused will be entitled to a complete acquittal. As such, throughout the historical development of criminal law, the defence of self-defence has always remained firmly entrenched as one of the best established defences an accused can raise. Various considerations, nevertheless, require to be satisfied before an act of killing or causing others severe bodily injury may be exculpated under the doctrine of self-defence. The traditional test of imminence, the necessity of using force, the manner in which the repelling force is employed, the test of proportionality and the

duty to retreat are among those which have substantially formed the features of a successful plea of the defence.

Despite being one of the most settled defences in criminal law, some issues related to the defence are worthy of investigation. This dissertation is primarily an examination of the issue of "excessive defence in self-defence" and an inquiry into the recently developed theory of the "battered woman syndrome" and its incorporation into the defence of self-defence. In the course of the discussion, I will also focus on the question of the belief of the accused in pleading the defence. This dissertation is also intended to provide, where appropriate, a comparison between the English, Australian and Canadian law of self-defence and the effect of the two issues mentioned above on the basic law of self-defence in the courts in these jurisdictions.

The second chapter is an attempt to examine the roots of the doctrine of excessive defence, the principal thrust of the defence, and its mixed fortunes in the courts. In the process of examining these issues, a detailed analysis will be made of relevant cases. This chapter concentrates on English and Australian cases and the law applicable in the two jurisdictions.

In the earlier part of chapter two a detailed analysis is made of cases in which the idea of excessive defence originated and this shows that the idea of a "middle path rule" can be traced back to old English cases. The reason why the doctrine has always been hailed as an Australian invention will then be explained.

This chapter also focuses on the Australian case which, as claimed by many, signify the demise of the doctrine in the Australian courts. The reasons affecting this

development are discussed. In the later part of the discussion, there is an examination of a case in which the doctrine seems to have been re-applied.

The third chapter concentrates on the development of the doctrine with particular reference to the experience of the Canadian courts. Reference is made to the provisions in the Canadian Criminal Code related to the defence of self-defence and the discussion then proceeds to deal with the issue of whether the application of the doctrine of excessive force in the Canadian courts has been influenced mainly by Australian cases. A series of cases at the provincial courts level is discussed in detail, particularly the cases prior to the Supreme Court of Canada's decision in *Brisson v. The Queen.*[1] Reference is also be made to a series of Supreme Court decisions subsequent to *Brisson.* The latter part of the chapter highlights the reception of the doctrine in the Canadian provincial courts in the aftermath of *Brisson.* Several issues are discussed. The main point is whether the law of excessive defence was abandoned because of the demise of the doctrine in Australia and England, or whether there are other reasons for this which are peculiar to Canadian law. Throughout the discussion, a comparison with the Australian and, where necessary, English cases is made.

In any discussion of the defence of self-defence it is inevitable that the issue of the belief of the accused plays an important part. In a plea of self-defence, the belief of the accused will be relevant in two situations: firstly, his belief as to the situation entitling him to exercise his right to self-defence - at this stage it could be said that it relates to the requirement of imminence in the defence - and secondly, his belief as to the amount of repelling force necessary in the defence - the issue which is related to the test of proportionality in the defence. The fourth chapter examines on the approach taken by the Australian and English courts in relation to the issue of the

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1 139 D.L.R. (3d) 685.

accused's belief in the two situations mentioned above. The essential issue is whether to apply an objective theory of reasonableness or whether a purely subjective belief of the accused will be enough to justify a belief in self-defence.

The discussion occupying the fifth chapter focuses on the issue of the incorporation of the theory of the "battered woman syndrome" in the law of self-defence. In the first part of this chapter an attempt is made to clarify the essence of the theory, its origin and the criticisms made of it. The discussion then proceeds to deal with the application of the theory in the courts. This chapter concentrates on the reception of the theory in the Canadian courts. The theory of the "battered woman syndrome" consists of two main ingredients, namely, the "cycle theory" and the theory of "learned helplessness". This chapter analyses the applicability of the two theories in criminal cases involving a battered woman.

The law on self-defence in Canada is set out in several provisions in the Canadian Criminal Code. The question is raised as to whether different provisions will lead to different consequences in the Canadian courts as far as the introduction of the theory is concerned. The conclusion is reached that different provisions will necessarily affect the application of the theory in courts.

Chapter six is composed of two parts: part (A) is an analysis on the application of the theory in English courts, and part (B) is an examination on the theory in Australian courts. It is noted that battered women in England, in most cases, plead either provocation or diminished responsibility, or both together, rather than arguing their cases on the basis of self-defence. Hence, it could be said that the theory of battered woman syndrome has been treated quite differently in England from the way it has been treated in Australia and Canada. In this part of the

discussion, two popular decisions of the English Court of Appeal are examined in some detail. In the course of examining the theory in England, reference is made to a recent decision of the Privy Council which could have an important impact on the application of the theory in future cases in English courts.

The second part of the chapter is an attempt to illustrate the experiences of the Australian courts with regard to the application of the theory. A detailed analysis is made of the development of the defence of self-defence prior to the cases in which the theory have been introduced. For this matter, several cases are referred to and the main focus is on the attitude of the Australian judges in dealing with the question of the accused's belief as to the circumstances entitling one to take action in self-defence. In the last part of this chapter, several cases are highlighted where the theory itself was successfully introduced. To conclude the discussion of Australian developments, reference is made to a recent case decided in the Supreme Court of the Northern Territory. In this case, a battered woman pleaded self-defence, but without supporting her case with the theory of battered woman syndrome. The arguments put forward in the judgement of the Supreme Court is particularly attractive to those who do not wish to "syndromatise" battered women in courts.

This thesis is an enquiry into two issues related to the defence of self-defence, namely the doctrine of "excessive force in self-defence" and the theory of the "battered woman syndrome". The final chapter is therefore divided into two parts, each part a conclusion in relation to one of these issues. Murder is the most serious crime in the criminal law; the doctrine of "excessive defence in self-defence" and the theory of the "battered woman syndrome" - if accepted for incorporation in the defence of self-defence - in their very essence potentially completely exonerate those who have been charged with murder. However, whether the theories can fit

comfortably with the contemporary law of self-defence is a matter of controversy. This thesis addresses that controversial and sometimes emotive issue.

CHAPTER TWO

THE DOCTRINE OF EXCESSIVE SELF-DEFENCE

2.1 INTRODUCTION

The doctrine of excessive self-defence manslaughter, despite being a "halfway house"[1] or a middle path, has also proved to be a controversial doctrine.[2] The simplest explanation of the concept would be that where a plea of self-defence to a charge of murder fails only by reason of excessive force, the proper verdict is manslaughter not murder.[3] Despite being a benevolent doctrine, it has been described as seriously defective, in that in cases where it does apply it will often add little more than an unnecessary complication to the issues of self-defence and provocation.[4] The doctrine is also said to be essentially flawed. The rule in *Viro v. The Queen*[5] (one of the cases where the concept originated) has been described as lacking in coherence and consistency.[6]

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1 P. Gillies, "*Criminal Law*" (3rd ed. 1993), at p. 306.
The writer in his comment regarded the concept of self-defence as a "concessional doctrine."

2 P.A. Fairall, "*The Demise of Excessive Self-Defence Manslaughter in Australia: A Final Obituary?*" (1988) 12 Crim.L.J. 28.

3 *Ibid.*, at p. 28.

4 I.D. Elliott, "*Excessive Self-Defence in Commonwealth Law: A Comment.*" (1973) 22 I.C.L.Q. 727 at p. 736.

5 (1978) 141 C.L.R. 88. This case will be discussed in detail later in this work.

6 *Supra*, fn. 2 at p. 29.

2.2 THE RATIONALE OF THE CONCEPT

As necessity and proportion are the two ingredients of self-defence, excessive self-defence provides a compromise in cases where the proportionality rule has been violated. The basic idea centres on the assumption that in pursuing one's right to defend his life any over reaction on the part of the defender is excusable. Mr. Justice Mason (as he then was) in *Viro v. The Queen*[7] explained the rationale of the concept in the following terms:

"The underlying rationale of *R. v. Howe* is to be found in a conviction that the moral culpability of a person who kills another in defending himself but who fails in a plea of self-defence only because the force which he believed to be necessary exceeded that which was reasonably necessary falls short of the moral culpability ordinarily associated with murder. The notion that a person commits murder in these circumstances should be rejected on the ground that the result is unjust. It is more consistent with the distinction which the criminal law makes between murder and manslaughter that an error of judgement on the part of the accused which alone deprives him of the absolute shield of self-defence results in the offence of manslaughter."[8]

Thus, the major argument in upholding the concept lies in the degree of culpability of the accused. It is accepted that a distinction has to be made between a person who acts with a clear intention of committing the crime of murder and an accused who committed it as a result of finding himself in a pressing situation. The degree of moral culpability of an accused committing such a crime in exceptional circumstances is undoubtedly lower than that of a premeditated murderer. Therefore,

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7 *Supra*, fn. 5.

8 *Ibid.*, at p. 139.

as it has been argued,[9] to treat such a person as an ordinary criminal is unjust, and justice calls for leniency in dealing with such an offender. Hence, a "middle ground" has to be found, and to reduce the crime to manslaughter seems to be the proper approach.

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9 It was argued that: "The moral culpability of the man who honestly believes that he needs to use lethal force to defend himself - no matter how mistaken his belief - is surely very much less than that of the man who kills deliberately and in cold blood. It is submitted that society ought to reserve its major condemnation for the cold blooded killer, and to have the mistaken victim of an attack convicted of the same crime tends to weaken this condemnation."
P. Smith, "*Excessive Defence-a Rejection of Australian Initiative*?" [1972] Crim.L.R. 524 at p. 533.

2.3 THE ORIGIN OF THE DOCTRINE AND ITS DEVELOPMENT

The doctrine of excessive self-defence manslaughter has been described as one of the major contributions to the law of homicide by the Australian courts.[10] Two cases have been identified as being the source of the doctrine, *R. v. McKay*[11] and *The Queen v. Howe*.[12] However whether the rule really derives from these two cases is a matter of some obscurity. The issue is now discussed.

2.3.1 The origin of the middle path rule

Mead's and Belt's case[13]

The principle of reducing murder to manslaughter can be traced back to an English case decided in 1823, the case of *Mead and Belt*. In this case, as a result of some altercation, the accused was threatened with having his house pulled to the ground. The night after the threat, a number of persons came to his house, menacing him verbally. The accused, under the apprehension, as he alleged, that his life and property were in danger, fired a pistol, fatally wounding one of those menacing him.

In his direction to the jury the judge said that, if it were satisfied that the shot was fired without any reasonable apprehension of danger but for the purpose of

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10 Morris and Howard, "*Studies in Criminal Law*" (1964), at p. 113.

11 [1957] V.R. 560.

12 [1958-1959] 100 C.L.R. 448.

13 (1823) 168 E.R 1006.

killing out of anger and resentment, that would render the accused guilty of murder.[14] On the other hand, if the jury were satisfied that the accused fired the pistol in the belief that his life and property were in serious danger, and that the party of attackers was on the point of breaking in to put into effect the threats of the day before, the accused was justified in firing the shots.[15] By the word "justified" it would probably be meant that the accused would be entitled to a complete acquittal on the ground of self-defence. The judge went on to instruct the jury that if they are of the opinion that the accused only intended to frighten the attackers, then the case was one of manslaughter. On these terms of instruction the jury found the accused guilty of manslaughter.

It is quite clear that the case did not specifically mention the doctrine that could render an accused guilty of manslaughter in a case where defensive force went further than necessary. However, the significant point is that this case allowed an accused under special circumstances to be convicted only of manslaughter. In the light of this case, the jury was clearly directed that either the accused's act was one of justifiable self-defence, which would result in no criminal liability at all, or the shots were fired in anger and with the intention of punishing the attackers. In this situation it would be an act of murder. Alternatively, the act was the result of the accused's fear for his life and the safety of his property and the firing of the shots was not done with the intention of killing the attackers but rather for the purpose of frightening and chasing them away. If in pursuit of this objective he caused the death of one of the intruders the accused would be guilty only of manslaughter.

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14 *Ibid.*, at p. 1006.

15 *Ibid.*

R. v. Scully[16]

In this case it was decided that if a person who was employed to watch his master's premises feared that his life was in danger or felt that there was an actual threat to his life from a trespasser, and so killed the apprehended assailant (the trespasser), his act of killing the purported assailant would be justifiable under the principle of self-defence. However, if there were no threat to his life or no reason to fear that his life was seriously threatened, and the accused rashly killed the intruder, his crime would be one of manslaughter.

This is, in fact, a "middle ground" principle. The accused was not to be completely acquitted because the basic condition of self-defence was not met, namely his life was not in danger, but at the same time the killing did not smack of murder; the accused had the responsibility of watching the garden for his master and the deceased had unlawfully entered into the premises without due permission.

Though it was not really a case of excessive self-defence as such, the important fact is that the decision was clearly a compromise between the two extreme positions.[17] This case shows that the idea of reduction from murder to manslaughter was acceptable long before it was critically debated.

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16 (1824) 1 Car & P. 319.

17 "Two extreme positions" means, (a) granting the accused a complete acquittal or, (b) convicting him of murder.

R. v. Patience[18]

Not very long after *Scully*, the idea of having a middle ground solution was again approved. This time the accused was attempting to resist illegal violence against him by a person who thought he had the right to arrest him. It was decided that the attempted act of arrest was illegal and that if a person encounters illegal violence, and he resists that violence with anything he happens to have in his hand, and death ensue, that would be manslaughter.

It appeared in this case that if the accused took up a weapon - in this case a knife - after seeing the attacker come at him, it might be evidence of previous malice; however, if the knife was already in his hand when the attack occurred, this is a clear case of self-defence without malice aforethought. Therefore, if death ensued the killing was manslaughter not murder.

R. v. George Smith[19]

The facts of the case were that the accused and his brother were attacked by the deceased with whom they had a fight not very long before the killing. The evidence strongly suggested that the deceased intentionally followed the accused and his brother for the purpose of continuing the fight. This resulted in another encounter, following upon which the deceased met his death from a bayonet wound.

The accused's brother admitted to possessing the weapon before the fight took place, but in the ensuing struggle with the accused he lost possession of it. The deceased then used it in his attack upon the accused.

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18 (1837) 7 Car & P. 775.

19 (1837) 173 ER 441.

In his summing up, Bosanquet J. told the jury that if it was satisfied that the accused brought the weapon for the purpose of entering into a fight with the deceased, then he would be guilty of murder. If it was satisfied that the accused did not enter into a fight with the intention of using the weapon, then the question would be: did he use it in the heat of passion in consequence of an attack made upon him? If he did then it would be manslaughter. The judge went on to say that if the jury were satisfied that the accused did only what he thought to be necessary at that point to defend himself from a murderous assault or an assault that the accused believed would cause him serious bodily injury, and that the accused has no other means of escape, then his defensive act would be justifiable, entitling him to a complete acquittal.

These instructions were clearly based upon a middle path approach. Nevertheless what is not specifically clear is whether the judge intended to formulate a new binding concept, departing from the traditional approach of the murder or nothing rule, to allow an accused to be convicted of manslaughter in a special case such as this. The English courts did not look at it in this way. The Australian and Canadian courts by contrast have certainly felt that this case provides support for the doctrine of excessive self-defence.

R. v. John Bull[20]

In this case the accused met the deceased and his friends on the street where they were heading home after an evening of drinking. A quarrel started and the accused stabbed the deceased to death. There was some discrepancy in the testimony of the witnesses as to the conduct of the deceased and his friends prior to the infliction of the wound by the accused. The court, in its summing up, made it clear

[20] (1839) 9 Car & P. 22.

that the killing could not be justifiable homicide unless there was an intention on the part of the deceased and his companions to rob or murder the accused, or to do some serious bodily injury to him. It was also not the law that a man would be justified in taking away the life of another merely because he feared that he might be assaulted or indeed if he were actually assaulted.[21] The jury concluded that the case was not one of justifiable self-defence. The accused was found guilty but received a very strong recommendation from the jury for mercy, due to the fact that the accused committed the act under the apprehension of personal danger.

As it appeared, the reason for the recommendation for mercy was made out of a belief on the part of the jury that the accused had a reasonable apprehension of danger to his life. Nevertheless, it was not made clear in the report that the act of going beyond what would be necessary in his defence was also debated and became one of the reasons for the jury's recommendation for mercy. Despite this uncertainty, however, what was clear is the fact that the idea of avoiding the extreme punishment for murder under special circumstances was suggested and accepted by courts long before any sophisticated argument was made out to this effect.

R. v. Biggin[22]

In the present case the accused (appellant) was indicted with murder. The defence set up was that the act was done in self-defence, namely to repel a violent homosexual attack by the deceased. The appellant was then convicted of manslaughter. He appealed to the Court of Criminal Appeal on the ground that cross examination as to character contrary to section 1 (f) of the Criminal Evidence Act, 1898, was improperly addressed to him. In delivering the judgement of the court,

21 *Ibid.*, at p. 724.

22 [1920] 1 K.B. 213.

Lord Reading C.J. said: "It is quite clear, as the learned judge said in his summing up to the jury, that if the appellant was really placed in the dilemma that Gregory (the deceased) would kill him unless he killed Gregory and then he made up his mind to kill Gregory and killed him, that would justify the jury in returning a verdict of not guilty. The judge also directed the jury that if the appellant used more violence than was really necessary in the circumstances that would justify a verdict of manslaughter." The appeal focused on other grounds, but nowhere is exception taken to this clear direction by the trial judge, Darling J., that excessive and lethal self-defence should in such circumstances create liability for manslaughter and not for murder.[23]

The direction by the trial court to the jury was indeed a clear explanation of the excessive self-defence concept. However, it was not because of the doctrine of excessive self-defence that the accused's appeal succeeded. It is perhaps for this reason that this case was not considered as an authority on the doctrine of excessive self-defence in English courts.[24]

2.3.2 Australian roots of the doctrine

An Australian case on the doctrine of excessive self-defence has been traced back to 1871. This is the case of *Griffin*.[25] In this case the deceased aware that his pig had been shot dead by the accused, ran towards the accused's house to carry out

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23 *Supra*, fn. 10 at p. 130 - 131.

24 The case of *R v. Biggin* was cited in the Privy Council's decision in *Palmer v. R.* [1971] 1 All ER 1077, but the judges refused recognition of the trial court's direction on excessive self-defence. In the English Criminal Court of Appeal's decision in *McInnes* [1971] 3 All ER 295, *R. v. Biggin* was not even cited.

25 (1871) 10 S.C.R. (N.S.W.) 91.

an act of revenge. The accused was at that time standing alone at his door, holding a gun usually used for fowling purposes. When he saw the deceased coming in his direction, he called out to the deceased to stop, and shortly thereafter fired a shot which caused the death of the deceased. The accused admitted in court that he fired the shot under a nervous but reasonable apprehension of danger. It was the view of the majority of the court that a manslaughter verdict was open to the jury in these circumstances, and not merely a compromise.

Eighty six years after the case of *Griffin* was decided, the concept of excessive defence was then resurrected in the Australian case *of R. v. McKay*.[26] (Before elaborating the case of *McKay* it is necessary to point out here that *Griffin* was indeed cited by the Supreme Court of Victoria. However, the court's direction to the jury in the *Griffin* case, which is in line with what would now be known as the doctrine of excessive self-defence, was not elaborated. The case was cited for the purpose of supporting the test of reasonableness in cases of self-defence against illegal violence to the person.[27])

In *R. v. McKay* the facts were that the accused was the caretaker of a poultry farm belonging to his father. Having had his fowls stolen several times, the accused decided to take steps to secure the property. The accused's father had installed a system of bells which rang in the house some distance away from the fowl pens when intruders entered the pens, but the thefts continued. There was also evidence that the accused had had for some time a loaded rifle in his room. One day at around dawn the alarm bells rang and the accused saw a person come into his premises. He fired one shot at the intruder, who then tried to escape. The accused fired four more shots

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26 *Supra*, fn. 11.

27 *Ibid.*, at p. 573.

and it was suspected that one of these shots killed the intruder. In the trial court, the judge directed the jury as follows:

"If you think that the accused fired with the intention of killing the thief, and that at the time when he fired he was under the influence of resentment or a desire for revenge or a desire to punish the thief, then he is guilty of murder. If you think he was honestly exercising his legal right to prevent the escape of a man who had committed a felony and that the killing was unintentional but that the means which the prisoner used were far in excess of what was proper in the circumstances, then you should find him guilty of manslaughter."[28]

In the light of this direction, the accused was found guilty of manslaughter. Mr. Justice Lowe said in his judgement:

"If the occasion warrants action in self-defence or for the prevention of felony or the apprehension of the felon, but the person taking action acts beyond the necessity of the occasion and kills the offender, the crime is manslaughter not murder."[29]

From this judgement it seems that the direction given to the jury was without any qualification and eminently straightforward. It is either the case that the accused in firing at the deceased, did it out of resentment or the desire for revenge or to punish the thief, or he honestly thought that he was exercising his legal right to prevent a felony, but the means which he used were in excess of what was necessary in the circumstances. The former would hold him guilty of murder and the latter would convict him of manslaughter. Such a judgement would also mean that in every case where the right of self-defence arises, as long as the defender could prove

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28 *Ibid.*, at p. 564.

29 *Ibid.*, at p. 563.

that he is acting in his defence and without intention of punishing the deceased or acting out of resentment, he could never be convicted of murder. This would be so even though the accused employed more force than was necessary in the circumstances.[30]

The jury appears to have been convinced that the four shots were fired in the accused's attempt to protect his property and were therefore within the ambit of self-defence. Hence, as long as the act originated in the context of self-defence, even if later it went beyond what seems to be proper, the law in *McKay* suggests that the accused could not be convicted of murder.

The decision in *McKay* was later approved by the High Court of Australia in *The Queen v. Howe*,[31] in which Sir Owen Dixon C.J. in his judgement posed a question:

"Had he (the accused) used no more force than was proportionate to the danger in which he stood, or reasonably supposed he stood, although he thereby caused the death of his assailant he would not have been guilty either of murder or manslaughter. But assuming that he was not entitled to a complete defence to a charge of murder, for the reason only that the force or violence which he used against his assailant or apprehended assailant went beyond what was needed for his protection or what the circumstances could cause him reasonably to believe to be necessary for his protection, of what crime does he stand guilty? Is the consequence

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30 N.C. O'Brien, in his article " *Excessive Self-Defence: A Need for Legislation.*" 25 (4) (1983) Criminal Law Quarterly (Ontario) 441 at p. 443 regarded the judgement as a bald statement which could lead to absurd results in that an accused could kill another without regard to whether he honestly or reasonably believed such force was necessary and the result would always be manslaughter.

31 *Supra*, fn. 12.

of the failure of his plea of self-defence on that ground that he is guilty of murder or does it operate to reduce the homicide to manslaughter?[32]

It is interesting to note that in responding to his own question the Chief Justice admitted that there is no definite judicial decision providing the exact answer.[33] The Chief Justice however found it "reasonable" in principle to regard such a homicide as being reduced to manslaughter. In supporting his approval of the excessive defence concept, several judicial statements were referred to and, not surprisingly, these included the judgement of Mr. Justice Lowe in *R. v. Mckay*: "If the occasion warrants action in self-defence or for the prevention of felony or the apprehension of the felon, but the person taking action acts beyond the necessity of the occasion and kills the offender, the crime is manslaughter - not murder."[34] The Chief Justice emphatically approved the concept when he asserted: "from the foregoing authorities it appears that in substance the Supreme Court took a correct view of the consequences of the failure of a plea of self-defence to a charge of murder when it fails only because the deceased's death was occasioned by an excessive use of force, that is to say by force going beyond what was necessary in the circumstances or might reasonably be regarded in the circumstance as necessary."[35] The law thus says:

". . . . a person who is subjected to a violent and felonious attack and who, in endeavouring, by way of self-defence, to prevent the consummation of that attack by

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32 *Ibid.*

33 By saying this, it is suggested that the Chief Justice had approved the fact that there is no clear cut case which could be safely claimed as the case where the doctrine originated. By this, it also means that the court did not regard the case of *McKay* as the pioneer of the doctrine, even though this decision was highly referred to and approved.

34 *Supra*, fn. 11 at p. 563.

35 *Supra*, fn. 12 at p. 462.

force exercises more force than a reasonable man would consider necessary in the circumstances, but no more force than he honestly believes to be necessary in the circumstances is guilty of manslaughter and not murder."[36]

It appears in *R. v. Howe* that the reason for approving the concept of excessive self-defence laid down in *R. v. McKay* was the fact that the Chief Justice "deemed it reasonable" to apply the concept. In other words, the benevolent idea of reducing murder to manslaughter in a case where a defence is in excess of what would be necessary in the circumstances, was regarded as the best solution available in dealing with such cases, being the solution that best served the requirements of justice.

The High Court also quoted a number of old English cases in which the decisions were based on a compromise rule.[37] However, the judge gave no indication of the existence of any formal authority for excessive defence except that of *McKay's* case. Therefore, it could be said that even though there were several cases decided in line with the doctrine of excessive defence, none of those cases was specific enough to be considered as the first authority for the doctrine. The cases of *McKay* and *Howe* therefore serve as significant authorities in so far as the discussion of the origin of the doctrine is concerned.

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36 *Ibid.*, at p. 456.

37 Some of these cases have been discussed at p. 10 - 16 in this chapter. Other cases which were also quoted by the High Court are: *R v. Whalley* (1835) 7 Car.&P. 245, *Reg. v. Weston* (1879) 14 Cox C.C., *Mancini* (1942) A.C. 1.

2.4 *PALMER v. R.*: A SET-BACK TO THE DOCTRINE?

Nearly ten years after the decision in *The Queen v. Howe*,[38] the High Court of Australia was once again faced with the question of the validity of the doctrine of excessive self-defence. However, unlike in the two previous cases,[39] the High Court in *Viro v. The Queen*[40] was confronted with arguments in favour of rejecting the doctrine. The reason for the doubts that had now crept in lies in the fact that in 1970 the Privy Council, in an appeal from Jamaica, came out against the doctrine which was by then entrenched in the Australian courts. The case is now discussed in full.

2.4.1 The Privy Council decision in *Palmer v. R.*[41]

The fundamental question for the court's determination in the present case was whether in cases where, on a charge of murder, an issue of self-defence is left to the jury, it is in all cases obligatory to direct the jury that if it finds that the accused had used more force than was necessary in the circumstances it should return a verdict of guilty of manslaughter.[42] In other words, the issue was whether the doctrine of excessive self-defence as proclaimed in the Australian High Court case of *R. v. Howe* - which reduces murder to manslaughter in a case where the accused employed more force than would be reasonably necessary in the circumstances - was sound in principle. In this case, Lord Morris of Borth-Y-Gest found the concept not sufficiently attractive to follow. He observed that self-defence is a "straightforward

38 *Supra*, fn. 12.

39 The case of *Mckay*, *supra*, fn. 11, and the case of *The Queen v.Howe*, *ibid.*

40 *Supra*, fn. 5.

41 [1971] 1 All ER 1077.

42 *Ibid.*, at p. 1078.

conception" and no qualifying formula is to be employed in reference to it.[43] The proper method in dealing with self-defence would thus be: the defence of self-defence will only fail if the prosecution shows beyond doubt that what the accused did was not by way of self-defence. If the prosecution shows that what was done was not done in self-defence then the issue is eliminated from the case.[44] It was also stressed that if the jury considered that an accused acted in self-defence, or if the jury is in doubt as to this, then it should acquit: "The defence of self-defence either succeeds so as to result in an acquittal or it is disproved in which case as a defence it is rejected."[45]

In short, this case had clearly rejected the doctrine of excessive defence though both Australian cases propounding the concept were referred to. As repeatedly stressed by the court, there is no formula to be adopted. The court would rather prefer the case to be left to the good sense of the jury. The approach suggested by the court would therefore be: when there is a plea of self-defence, if the prosecution satisfies the jury beyond reasonable doubt that the accused was not acting in self-defence, then the jury should convict of murder. In the event that the jury has even the slightest reasonable doubt as to the prosecution case, the accused should be acquitted.

Having said that, however, there are other elements which in the opinion of the court should be considered by the jury where the accused is proven beyond doubt

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43 On this matter the preconditions for excessive self-defence laid down in *The Queen v. Howe* were not necessary. Which would also mean that the direction to the jury to decide whether the prosecution had successfully proved beyond doubt that the accused had not honestly believed that the force used was reasonably necessary to avert the danger, is not a proper direction. The case is now up to the good sense of the jury, based on the facts of the case.

44 Lord Morris in *Palmer v. R., supra*, fn. 41 at p. 1088.

45 *Ibid.*, at p. 1088.

not to have been acting in self-defence. It may be that in some cases the jury will have to consider whether the accused acted under provocation. If, based on the evidence, the jury is satisfied that the accused was provoked, then he would be convicted of manslaughter and not murder.

Moreover, in a situation where the prosecution satisfies the jury that the accused was not acting in self-defence and was also not provoked, it would be open to the jury to conclude that although the accused acted unjustifiably, he had "no intent to kill" or "to cause serious bodily injury" - then again, manslaughter should be left to the jury. Therefore, even though the accused could not be convicted merely of manslaughter for excessive defence, there are other considerations for the jury to take into account which could have the effect of avoiding a murder conviction. Indeed, the Privy Council seems to take the view that this approach would accord the accused better opportunities to avoid a murder conviction in a case where his plea of self-defence is eliminated.

With regard to the issue of intention, the Privy Council was of the opinion that if the prosecution failed to prove beyond reasonable doubt that the accused was not acting in self-defence, even if from the evidence the accused intended to kill the deceased in his defence, that intention would not require him to be convicted of murder. In other words, if there is a clear intention on the part of the accused to kill the deceased, but the jury is not satisfied beyond reasonable doubt that his act went beyond what was necessary in defence of his life, that act of killing is justifiable in the name of self-defence.[46] But if the prosecution proved that the intention to kill had existed before the quarrel - before the situation which necessitates the need for a defence arises - it suggests quite strongly that the accused was not acting in self defence. Similarly, if the attack is over, there is no reasonable apprehension of death

46 *Plankett v. Mitchell* [1958] Crim.L.R. 252.

or bodily injury on the part of the accused, but the accused still persists in using force and kills the attacker, this act clearly suggests that it is an act of revenge or punishment or pure aggression. There is no longer any link with the necessity for defence.

In this case it was contended on behalf of the appellant that if the jury came to the conclusion that the act of an accused person was done solely with an intent to defend himself, then an intention to kill or to cause grievous bodily harm would be negatived.[47] Therefore, in a case where the jury concluded that excessive force had been used the verdict should be one of manslaughter.

The Privy Council took the view that in repelling the attack in self-defence, one would have an intention to inflict grievous bodily injury or even an intention to kill the attacker, and if the prosecution satisfies the jury that the accused had one of these intentions in circumstances in which, or at a time when, there was no justification or excuse for having it, then the prosecution would have shown that the question of self-defence is eliminated. Thus the intention to kill must either be justified or excused. If that intention is not justified or excused, there will be no case of self-defence even if the accused was originally the party resisting the attack.

In short, the judgement shows that self-defence can involve intentional and unintentional killing. If the jury is satisfied that the killing was unintentional, the proper verdict is one of manslaughter. At the same time a valid case of self-defence could also involve a deliberate act of killing on the part of the accused person and it would be a justification if the deliberate action to kill was within the acceptable boundaries of self-defence, in other words, the killing is unavoidable and necessary;

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47 *Supra,* fn. 41 at p. 1084.

in such a case the killing is justifiable even if on the facts of the case it looks excessive.

2.4.2 *Palmer v. R.*: some comments

The Privy Council decision of *Palmer v. R.* was criticised with some stringency. It was described as a firm, uncompromising negative.[48] It was a retrograde and regrettable decision.[49] It has been argued that English law has a long tradition of recognising justifiable or exonerating homicide. Therefore it would not be inappropriate to accept the concept of excessive self-defence as another form of a defence to avoid a murder conviction. This concept would be of particularly great importance in a jurisdiction where capital punishment was still in practice. (In this regard, however, the question remains, would the doctrine be of less importance in a judicial system where capital punishment has been abolished?)

Two situations have been suggested where the defence of excessive self-defence could arise; "where the accused is acting in self-defence, and reasonably believes he is acting in self-defence, but in the opinion of the jury he goes further than the circumstances warranted, he goes beyond the necessity of the occasion. Or alternatively: if the accused is faced with a situation in which some action in self-defence would be lawful, and he intentionally kills another by using excessive force, he is guilty of manslaughter only, provided that he did not know that the force used was excessive."[50]

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48 A. Samuel, "*Excessive Defence - A Missed Opportunity*" (1971) 121 N.L.J. 669.

49 *Ibid.*

50 *Ibid.*

With regard to the first formulation, one could argue that if the accused was said to have "reasonably believed" that his act was within the limits of self-defence, the jury would not, on the contrary, be faced with as an unreasonable act. This is because it is the jury which decides if the belief is reasonably held. In other words, the formulation would be tantamount to saying: if the accused reasonably believed that his act was necessary in his defence, but on the contrary the jury found it unreasonably held, he should be convicted of manslaughter.

There can never be a situation where the accused reasonably believed that his act was justifiable but in the opinion of the jury it was in fact not. The reasonableness or otherwise of the accused's belief is judged by the jury based on a hypothetical person test. Therefore, if the jury found that the accused's belief was unreasonably held, it could not possibly be said that the accused had "reasonably believed" it was. Perhaps the proper formulation would be, if the accused "honestly" believed that his act was in self-defence but that belief was held by the jury to be unreasonable, he goes beyond the necessity of the occasion and thus should be convicted of manslaughter. The issue of belief in this formulation, would have to be elaborated further before it is intended to be a conclusive formulation in court.

In relation to the second formulation, it has been suggested that, in a clear case of self-defence, the accused "intentionally killed another by using excessive force", he would be guilty of manslaughter. However, this could only be so, if he did not know what he did was excessive.

Now, the question arising out of this formulation is this: could there be a case where one, in using excessive force, intentionally kills his attacker, not knowing the fact that the force used was indeed excessive? Take, for example, a case where a

person is attacked on a street by a drug addict who does not have a weapon. The accused has a knife at the time and deliberately stabs the attacker with the intention of causing his death. In this case, any reasonable person would appreciate that using a knife to stab and kill an attacker in such circumstances is in excess of what is reasonably necessary. Therefore, if a person did use a knife or anything else as a weapon to kill an attacker who was impaired as a result of taking drugs, the former would know that he was doing more than what would be necessary at that point. Therefore, under the suggested formulation, it seems that only in very extreme cases would a jury be likely to be convinced that an accused did not know his act had indeed exceeded what he should reasonably done, otherwise this formulation would be of no practical use.

The formulation would also seem to suggest that if, in a case of a minor attack the accused intentionally kills the attacker by using excessive force, but he did not know the force was excessive, he would still be "rewarded" with a manslaughter verdict. In contrast with the formulation in *R. v. Howe*, the doctrine of excessive self-defence would only be sought as a defence in a case where violence is used to prevent the consummation of a felonious and violent attack, an attack of a serious nature which causes a person reasonable apprehension of death or bodily injury.

In conclusion, the idea of having murder, manslaughter and complete acquittal options in the law of self-defence is indeed desirable. However, any attempt to replace the present law must be carefully formulated if unnecessary complications are to be avoided. The formulations suggested above are too brief and need more detailed analysis.

Another probable implication of the Privy Council's decision in *Palmer v. R.* arises in the context of resisting unlawful arrest. It was submitted that this decision disapproved strongly of those English cases which appeared to suggest that a verdict of manslaughter was proper where the accused killed another simply to avoid being arrested on an illegal warrant. And the consequence of it would be, that the citizen, is in a sense, be required ultimately to submit to an unlawful arrest.[51]

It was also said that as a result of the Privy Council's decision, the law relating to defence of property could also be rendered uncertain. It is admitted that self-defence could successfully be pleaded in a case where the accused has an intention to kill or to cause serious bodily harm. But it seems that the intent to kill must be a response to the necessity which the accused feels to defend himself. To take away the life of another just because of defending one's interest in his property would not seem to be justifiable. Therefore it seems unlikely that lethal force can now be used simply to defend property.

2.4.3 The Criminal Court of Appeal case of *R. v. McInnes*[52]

Despite being the subject of criticisms, the Privy Council's rejection of the doctrine of excessive self-defence was approved and followed in *R. v. McInnes*, an appeal case in the English Court of Criminal Appeal. In this case the accused stabbed the deceased with a knife which penetrated deep into his heart and consequently led to his death. The accused in his evidence claimed that the whole incident was an accident and that he had no intention of causing death.

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51 L.H. Leigh, " *Manslaughter and the Limits of Self-Defence*" (1971) 34 M.L.R. 685 at p. 687.

52 [1971] 3 All ER 295.

The issue of excessive force in self-defence was discussed and the primary point for the court's determination was whether or not the doctrine, which at that point was well - established in Australian courts, was recognised in English common law. Lord Justice Edmund Davies saw no reason to follow the doctrine and took the view that the rejection of the doctrine would not necessarily disadvantage the accused. If the plea of self-defence was unsuccessful, under the present English criminal law system it would still be possible for a jury to conclude that the accused "may have acted under provocation or that, although acting unlawfully, he may have lacked the intention to kill or cause serious bodily harm, and in that way render the proper verdict one of manslaughter."[53]

The decision of the Court of Criminal Appeal not only approved the Privy Council's approach, it also in a way repeated the conclusion arrived at by the Privy Council.[54] This case evidently approved the unwillingness of the English courts to adopt the reduction from murder to manslaughter principle in cases where the force employed by the accused was excessive.

2.4.4 *Viro v. The Queen*:[55] the revival of the doctrine in Australia

By virtue of Lord Justice Edmund Davies's decision in *R. v. McInnes,* it is clear that the English courts were not attracted by the doctrine of excessive defence

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53 *Ibid.*, at p. 301.

54 Reference here is made to page 1084 of *Palmer v. R.*, *supra*, fn. 41 and page 301 of *R. v. McInnes*, *ibid.* The argument is that if the plea of self-defence is eliminated, the jury would be allowed to consider the other mitigating factors: firstly, whether there was an element of provocation in the case. In the absence of any provocative action on the part of the attacker, the accused could still be avoiding a murder conviction if the jury is satisfied that he lacks intention to kill. This argument was reinstated in the case of *R v. McInnes*.

55 *Supra*, fn. 5.

which had been consistently accepted in Australia. Some seven years after the doctrine's rejection by Privy Council and the English Court of Criminal Appeal, however, the High Court of Australia was once again confronted with the issue. In *Viro v. The Queen*,[56] the High Court found it necessary to decide two primary questions:

1. Was the High Court bound by the decision of Privy Council in *Palmer v. R.* notwithstanding the court's earlier decision in *R. v. Howe*; and

2. What would be the proper directions to the jury when the defence of self-defence is raised?

In respect to the first question, Chief Justice Mason stated that neither the Privy Council's decision nor the previous decision of the High Court of Australia binds the court.[57] The issue now was whether or not the doctrine of excessive defence was still sound in principle and should be followed. Mason C.J. concluded that despite the fact that the High Court was not bound to follow its previous decision, the judgement in *The Queen v. Howe* was correct and the court should continue to follow the decision.

However the High Court, in deciding the present case, found itself compelled to formulate directions to guide the jury in deciding cases of this nature. It is important to note at this stage that these directions qualified the doctrine of excessive

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56 *Ibid.*

57 Mason C.J. in his judgement called for the re-examination of the question as the High Court was not bound by both the law in *Palmer v. R.* or *R. v. Howe*. *Viro v The Queen*, *ibid.*, at p. 137.

defence as proclaimed in *Howe* and *McKay*.[58] Because of their importance, it is necessary to set out these propositions in full:

1. (a) It is for the jury first to consider whether when the accused killed the deceased he reasonably believed that an unlawful attack which threatened him with death or serious bodily harm was being made or was about to be made upon him.

   (b) By the expression "reasonably believed" is meant, not what a reasonable man would have believed, but what the accused himself might reasonably believe in all the circumstances in which he found himself.

2. If the jury is satisfied beyond reasonable doubt that there was no reasonable belief by the accused of such an attack, no question of self defence arises.

3. If the jury is not satisfied beyond reasonable doubt that there was no such reasonable belief by the accused, it must then consider whether the force in fact used by the accused was reasonably proportionate to the danger which he believed he faced.

4. If the jury is not satisfied beyond reasonable doubt that more force was used than was reasonably proportionate, it should acquit.

5. If the jury is satisfied beyond reasonable doubt that more force was used, then its verdict should be either manslaughter or murder, depending upon the answer to the final question for the jury-did the accused believe that the force

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58 N.C. O'Brien, *Supra*, fn. 30 at p. 443.

which he used was reasonably proportionate to the danger which he believed he faced?

6. If the jury is satisfied beyond reasonable doubt that the accused did not have such a belief the verdict will be murder. If it is not satisfied beyond reasonable doubt that the accused did not have that belief the verdict will be manslaughter.

From the six propositions stated above, it may be observed that the directions are divided into two sections. The first four propositions mainly concern the belief of the accused regarding the existence of an unlawful attack which threatens his life or bodily integrity and the proper manner in which the defence is to be employed. It is to be noted that in the absence of such a belief (the belief on the part of the accused relating to the situation occasioning the right to defend) there will be no question of self-defence at all. Those propositions in other words are concerned with the occasion which necessitates the right to defend.

The fifth and the sixth propositions talk about the doctrine of excessive force in self-defence. The direction says that if the jury is satisfied beyond reasonable doubt that the accused used more force than what would be reasonably necessary, the verdict should either be murder or manslaughter. In this regard, attention is paid fully to the belief of the accused. Mason C.J. concluded that if the jury is satisfied beyond reasonable doubt, or in other words the prosecution successfully proved the case (to the jury) beyond reasonable doubt, that the accused did not believe that his defence was reasonably proportionate[59] he should be convicted of murder. However, if the jury is satisfied beyond reasonable doubt that the accused believed that the

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59 Probably in a case where the accused, knowing that the danger had passed, still continues using force and as a result kills the attacker.

force used (though excessive) was reasonably proportionate, (or if the prosecution failed to prove beyond reasonable doubt that he had no such belief) he should be convicted of manslaughter.

2.4.5 Two preconditions of excessive defence in *Viro's* formulation

It is also to be observed from the same test that there are two elementary conditions before the defence of excessive self-defence may be pleaded successfully.

1. The requirement of reasonable belief in the existence of an attack threatening death or serious bodily injury.

As mentioned earlier, this test applies at the initial stage of the proceedings, failing which no question of excessive self-defence can arise at all. With reference to proposition (1), the accused must have a reasonable belief as to the existence of a threat endangering his life or bodily integrity. The meaning of reasonable belief here is described in section (b) of the same proposition to mean not what a reasonable man would have believed but what the accused himself "might reasonably believe in all circumstances in which he found himself." From the explanation given, the requirement of reasonable belief becomes quite distinct from the traditional understanding. The common understanding of the words reasonable belief would mean the belief of the accused must be in accordance with the belief of a hypothetical person presumed to be in his position. If the hypothetical person would act in the same manner in which the accused had done, then he is said to have passed the reasonable belief test in that sense. However, reasonable belief in the first proposition in *Viro's* case was explained as what the accused himself might think

reasonable based on the circumstances on which he found himself. Which also means it is the state of mind of the accused which is now made the subject for the jury's examination.

The question is if reasonable belief of the accused is what he might think to be reasonable in the situation, what then is the difference, if any, between the reasonable belief of the accused as explained in the High Court's direction, and an "honest belief" of the accused? The question arises because when the direction says that the reasonable belief of the accused is not to be judged according to the reasonable man test, and specifically mentioned that it is the belief of the accused in the circumstances in which he found himself that should be considered, this suggests that the objective test has been replaced by the subjective test of the accused's belief. If this is the correct interpretation, what is then the difference between the concept of "honest belief" of the defender - which is a subjective test - and his reasonable belief as explained in the High Court's direction?[60]

It seems difficult to differentiate between the general test of "honest belief" and "reasonable belief of the accused in all circumstances in which he found himself" as explained in the direction. If reasonable belief is ascertained according to what the accused might personally have thought to be reasonable (and not the belief of other hypothetical persons presumed to be in the accused's position as normally understood) it has the same meaning as the test of "honest belief" of the accused. Or even if there is a difference, it would cause considerable difficulty for the court to explain it in plain terms to the jury. Therefore, even though the requirement says that the accused has reasonably to believe that a situation calling for the defence has arisen, the terms "reasonable belief" in the context of this direction are ambiguous.

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60 This is perhaps among the reasons why the six propositions laid down in *Viro v. The Queen* were said to be "more of a hindrance than a help".
P.A. Fairall, *supra*, fn. 2 at p. 33.

The ambiguity of the meaning is the result of the description of the phrase 'reasonable belief' itself as explained in the second part of the direction.

Mason C.J. provides no clear explanation of this, but in his judgement he states:

"A distinction is to be drawn between the accused's belief as to the danger which beset him and his perception of the proportionality of his response to the danger. For the offence to be reduced from murder to manslaughter it must appear that the accused reasonably believed in all the circumstances in which he found himself that an unlawful attack which threatened him with death or serious bodily injury was being or was about to be made upon him. But when it comes to the accused's belief as to the appropriateness of his response it is sufficient that he honestly believed that the force which he used was reasonably proportionate to the danger which he believed he faced. There is no additional requirement that his belief in this respect should be based on reasonable grounds. It is enough, as I have said, that the belief is held."[61]

This statement makes a clear distinction regarding the two situations where the requirements of belief becomes necessary, namely, the belief as to the danger confronted by the accused and the belief as to the appropriateness of the amount of force used by the accused in response to the danger. It is not difficult to understand that it is the honest belief of the defender which is decisive in determining the legality of his act of defence. Even if the amount of force used was more than what would be necessary in the circumstances, if he honestly thought the force was necessary and proportionate, the crime committed is to be reduced from murder to manslaughter.

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61 Mason C.J. in *Viro v. The Queen*, *supra*, fn. 5 at p. 143.

However, with regard to the question of belief as to the existence of a danger threatening the accused's life and bodily integrity, the test here would be a reasonable belief in all the circumstances in which the accused found himself. There is no further explanation to elaborate the true meaning of the direction. Hence, the only explanation of the issue is found in the directive which was quoted earlier, that is, the meaning of reasonable belief in the present context does not mean what other reasonable men would believe. Thus, by literal interpretation, it set aside the objective test of reasonableness.

The second condition before the defence of excessive defence could be made a successful plea, by virtue of the six propositions in *Viro* is:

2. The requirement of a belief as to the appropriateness of the defence used by the accused.

Regarding the requirement of belief as to the appropriateness of the defence, the above quoted judgement of Mason C.J. made it absolutely clear that the belief has to be measured according to the honest belief of the accused. He stressed that: "There is no additional requirement that his belief in this respect should be reasonably held or that it should be based on reasonable grounds."[62] Thus, the test is now what the accused actually believed.[63] The situation therefore would be, if the jury found that more force than required was employed by the accused in his defence, but such excess in defence was honestly believed to be necessary in the circumstances of the case, the verdict would be one of manslaughter. Nevertheless,

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62 *Ibid.*, at p. 143.

63 "Whatever the degree of force intentionally of recklessly employed by D (the accused), the question was whether he actually believed it to be warranted by the situation, or as it was sometimes put, proportionate to the danger which he believed he faced."
Howard's "Criminal Law" (5th. ed., 1990), at p. 101.

if the accused did not honestly believes that the excess in force was necessary he will be convicted of murder.

In summary, if the prosecution fails to prove beyond reasonable doubt that when he killed the deceased the accused did not reasonably believe, taking into account the circumstances in which he found himself, that an attack was being made or was about to be made against him, the accused's act is within the scope of self-defence. However if the jury is satisfied that more force was used than was necessary then the next question would be whether the accused honestly believed that the force employed was reasonably proportionate to the danger he encountered. If the accused has such a belief, he should be convicted of manslaughter only. However if the prosecution satisfies the jury beyond reasonable doubt that the accused did not have that honest belief, under the sixth directive, he is guilty of murder.

2.5 THE DOCTRINE OF EXCESSIVE SELF-DEFENCE UNDER *ZECEVIC*

The whole concept of excessive force in self-defence was again scrutinised by the Australian High Court in the case of *Fadil Zecevic*.[64] The appellant and the deceased were neighbours in a block of flats. The relationship of their two families deteriorated as a result of the deceased's failure to close the security gates to the courtyard around which the units were erected and his failure to place his car in the garage provided.

On the day of incident, the appellant and the deceased were involved in an altercation flowing from the disagreements. The appellant's version of events was that he went to the deceased's apartment to ask the reason for the deceased's refusal to close the gate. The deceased was hostile, and stabbed the appellant in the chest. The deceased then shouted, "I blow your head off" and went towards his car. The appellant, having admitted that he was very angry and scared, went into his house took a gun and shot the deceased. He justified his act by asserting that having been stabbed already and having been threatened to have his head blown off, he had every reason to believe the seriousness of the threat. His life, as well as the well-being of his family, was in danger, and therefore even though admitting that he did not want to kill the deceased, he did so for the purpose of self protection.

The trial judge rejected outright the issue of self-defence,[65] obviously after having regard to the first proposition laid down by Mason C.J. in *Viro v. The Queen*. The plea of self-defence was therefore withdrawn from the jury on the ground that the only inference open upon the evidence was that the appellant did not reasonably

64 [1986-1987] 25 A.Crim.R 163, (1987) 162 C.L.R. 645.

65 *Ibid.*, at p. 169.

believe that an unlawful attack which threatened him with death or serious bodily harm was being or was about to be made.

Counsel for the appellant argued that the requirement of reasonableness in the first proposition laid down in *Viro v. The Queen* was flawed in its essence. A reasonableness requirement was entirely inappropriate in a plea of self-defence which operates as a defence to offences requiring mens rea: it is enough to consider the case on the basis of the actual belief of the appellant. This argument was rejected by the majority of the judges in the High Court on the ground that self-defence was essentially exculpatory in its effect and the fact that it now falls to be excluded by the prosecution rather than proved by the defence does not alter its true nature.

The judges in *Fadil Zecevic*, however, found it necessary to re-examine the six propositions in *Viro v. The Queen*. This was done not because of the contention by the appellant's councel on the requirement of reasonableness in the first proposition but, rather, on the following grounds:

1. The six propositions enunciated by Mason C.J. which were accepted by Gibbs J., Jacobs J., and Murphy J. were accepted only for the purpose of achieving a measure of certainty in a situation of diversity of opinion and Barwick C.J. was in dissent.[66]

2. The directions particularly the fifth and the sixth propositions in *Viro* (the directions on excessive force in self-defence), apparently caused great difficulties for judges in instructing juries.

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66 *Ibid.*, at p. 175.

As the result of this re-examination, the court in the end rejected all the propositions which were originally supposed to be the guiding factor in self-defence cases.

2.5.1 Two differences between *Viro* and *Zecevic*

There are two specific differences between the High Court decision *in Viro v. The Queen* and the majority judgement in *Zecevic*:

1. As was laid down in the first proposition in *Viro*, the accused's entitlement to act in self-defence will only arise on the occasion where there is an "unlawful attack" which causes him to believe, on reasonable grounds, that his life is threatened. In *Zecevic* on the other hand, the entitlement was not so confined. In this case, the judges gave the example of an attack of a serious nature against someone made by an insane person who was incapable of forming the necessary intent to commit a crime. Under the guidelines in *Viro*, it seems that the person attacked would not be able to exercise his right to self-defence apparently because the attack was not unlawful as the insane person was incapable of committing a crime in its true sense. In *Zecevic*, the real test was whether or not the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did. Thus, in a case where an accused's life was seriously threatened, even if that threat came from an insane person, the accused will have the right of self-defence.

Nevertheless, the judges recognised that the right of self-defence may not always available against lawful attack. The example given was of a case where the defendant provoked an attack by his own conduct. In this case if the person so provoked used lawful force in his own defence and in so doing the original trouble

maker felt that his life was in turn threatened, he cannot lawfully kill in self defence.[67]

It is important to state here that the difference discussed above mainly concerned the first part of the requirement of a successful plea of self-defence laid down in *Viro's* rule, that is, in the situation where the right of self-defence begins. Therefore, as to the requirement of reasonable belief in the existence of a danger, both *Viro* and *Zecevic* were in agreement that this fell to be satisfied on the basis of a reasonable man test.

2. The second difference lies in the treatment of the use of excessive force or disproportionate force. As stated in propositions five and six in *Viro v. The Queen*, if the accused honestly believed that the amount of force employed in his defence was reasonably proportionate to the danger which he believed he faced, even though if the jury is satisfied beyond reasonable doubt that it was excessive, the accused would be held guilty of manslaughter and not murder. Only if the accused did not have that belief, will he be convicted of murder.

However such was not the case in *Zecevic*. Wilson, Dawson and Toohey, JJ. in their joint judgement concluded that the use of excessive force in the belief that it was necessary in self-defence will not automatically result in a verdict of manslaughter. If the jury concludes that the manner in which the defence was made was not reasonably necessary, the defence of self-defence will fail and the circumstances will fall to be considered by the jury without reference to that plea.[68]

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67 Wilson, Dawson and Toohey JJ. in their judgement stated: "A person may not create a continuing situation of emergency and provoke a lawful attack upon himself and yet claim upon reasonable grounds the right to defend himself against that attack." *Ibid.*, at p. 175.

68 *Ibid.*, at p. 175.

The immediate outcome of the judgement, apart from rejecting the reduction of murder to manslaughter principle as set out in *Viro*, is that where the plea of self-defence is rejected on the ground that the force was excessive, it is now open to the jury to consider other mitigating factors. In their judgement the majority quoted with approval the decision of the Court of Appeal in England in the case of *McInnes*: "it is important to stress that the facts upon which the plea of self-defence is unsuccessfully sought to be based may nevertheless serve the accused in good stead. They may, for example, go to show that he may have acted under provocation or that, although acting unlawfully, he may have lacked the intent to kill or cause serious bodily harm, and in that way render the proper verdict one to manslaughter."[69]

Having explained the legal position of a case where the jury concludes that the accused had not been reasonable in his defence, the court proceeded in its judgement by stating that, in the event that the jury is satisfied that the defensive conduct of the accused is reasonably necessary at the time to avert a danger to his life and bodily integrity, his defensive act would be completely justifiable and he would be acquitted on the basis of the defence of self-defence. This would be so even if on the face of it the defensive act would appear to be excessive. In that particular instance, it is the reasonable belief of the accused which really matters. If the jury is satisfied that the repelling force employed was reasonably necessary, there will be no question of excessive defence at all. The case would be a traditional self-defence case without having to deal with the doctrine of excessive self-defence as in *Viro v. The Queen.* And this is the point where the two cases differed in their substance. Whereas, in *Viro*, the law is that where the accused honestly believed that the amount of force used was proportionate to the threatening attack, this would allow him to be convicted of manslaughter on the ground of excessive force in self-defence, the result of *Zecevic* is that there is no proportionality requirement. By virtue of *Zecevic*, the

69 *Ibid.*, at p. 176.

primary concern for the jury is the reasonable belief of the accused. If the jury is satisfied that the amount of force applied was reasonably necessary, the accused would be entitled to a complete acquittal. However, if it is satisfied that the repelling force was not reasonably necessary, the accused should be convicted of murder. The "new concept" simply recognises no qualified defence of excessive self-defence.

2.5.2 The effect of *Zecevic* on the doctrine of excessive self-defence

By the abolition of the concept of excessive force in self-defence, the task of the trial judges as well as the juries apparently becomes easier, particularly in determining the question of belief of the accused. By virtue of the six propositions laid down by Mason C.J. in *Viro v. The Queen*, there are two different situations where the belief of the accused became the subject of examination. First, at the stage of determining the belief of the accused in the existence of an attack threatening the accused's life and bodily integrity. At this stage, the reasonableness test is applicable. Even so, as discussed, by "reasonable belief" was not meant what a reasonable man would have believed but what the accused himself might reasonably have believed in all circumstances in which he found himself.[70]

The second stage relates to the appropriateness of the response by the accused to the attack. At this stage, the jury will have the task of determining whether the accused honestly believed the amount of force used was really necessary and proportionate to the danger he faced. As it was concluded in *Zecevic*, the test is now whether the accused reasonably believed that a situation had arisen which

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70 D. Lanham, in his article," *Death of a Qualified Defence?* " (1988) 104 Law Quarterly Review at p. 243, while discussing the requirement of accused's belief in *Zecevic* and *Viro*, said that "in any event it is difficult to know what practical difference there is between the two test of reasonableness."

necessitated the use of force in his defence. The law is now entirely based on the necessity to defend.

2.5.3 Mason C.J. in *Zecevic*

The development of the excessive defence concept becomes more interesting as Mason C.J. was present and involved in the decision making (in the High Court of Australia) in both of the two important cases involved. Mason C.J., who delivered the majority judgement in *Viro v. The Queen,* had clearly given much emphasis to the aspect of morality in cases of self-defence. This is evidenced in his judgement when he asserted:

". . . the moral culpability of a person who kills another in defending himself but who fails in a plea of self-defence only because the force which he believed to be necessary exceeded that which was reasonably necessary falls short of the moral culpability ordinarily associated with murder."[71]

To him the moral culpability of a person committing the act of murder under pressing conditions such as self-defence was lower than the ordinary murder case. However by abandoning the concept that he himself developed, does it means that the moral aspect in the law self-defence becomes less important? On this question, Chief Justice Mason had this to say:

" I still believe that the doctrine enunciated in *Howe* and *Viro* expresses a concept of self-defence which best accords with acceptable standards of culpability, so that an accused whose only error is that he lacks reasonable grounds for his belief that the

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71 Mason C.J. in *Viro v. The Queen, supra,* fn. 5 at p. 139.

degree of force used was necessary for his self defence is guilty of manslaughter, not murder."[72]

From the above quoted passage, it is clear that Mason C.J. was still of the opinion that the doctrine of excessive self-defence was the best way to deal with the case where an accused was excessive in his defence; however he conceded that "in the light of experience since *Viro*. . . . .I recognise that the doctrine imposes an onerous burden on trial judges and juries"[73] and therefore accepted the joint judgement by the majority judges in that case, which ultimately means abandoning the concept that he propagated in *Viro*. Deane J. and Goudron J. in *Zecevic*, however, in their dissenting judgement were still of the view that the moral culpability argument was compelling in favour of the retention of the qualified defence.

One criticism of Chief Justice Mason's attitude in *Zecevic* is, as it appeared in his judgement in *Viro*, that he regarded the concept of excessive force in self-defence enunciated in *R. v. Howe* as capable of being refined, elaborated and developed in accordance with the tradition of the common law in future cases.[74] However as he admitted,[75] the uncertainty of the concept remained unresolved and trial judges had continued to encounter difficulties in explaining the elements of *Viro* formulation to juries. Having stated the opinion that the concept would be refined and elaborated in later cases, one would have thought that by having the opportunity to judge the case

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72 Mason C.J. in *Fadil Zecevic*, *supra* fn. 64 at p. 167.

73 *Ibid.*, at p. 168.

74 *Supra*, fn. 5 at p. 144.

75 Mason C.J. in *Zecevic*, *supra*, fn. 64 at p. 167, admitted that the uncertainty of the doctrine of excessive self-defence, particularly the six directions formulated in that case, failed to be elaborated and refined as he had hoped. He then cited the case of *McManus* (1985) 2 NSWLR 448, and *Lawson and Forsythe* [1986] V.R. 515, where the trial judges found difficulties in directing the juries in accordance with the directives expounded in *Viro*.

of *Zecevic*, which also concerned the issue of excessive defence, he would have been the best person to clarify and, using his own words, "refine and elaborate" the doctrine. Nevertheless, instead of doing what he would want others to do, he agreed on the abolition of the concept and accepted the decision *of Palmer v. The Queen,* a case he had previously rejected.

Nevertheless, even though the doctrine was abolished by virtue of the joint judgement of the majority in *Zecevic*, with the approval of Mason C.J., there is nothing whatsoever in the judgement to suggest any serious defect in the basic idea of the concept itself. As was stated, two judges, namely Deane J. and Goudron J., are still favoured the retention of the excessive defence concept on the basis of moral the culpability argument. The rejection was rather because of technical issues which the judges found it difficult to resolve.[76] So, as it can be abandoned, it can also be revived when there is a need to do so.[77]

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76 It was commented that: "The principal difficulty with the formulation of *Viro v. The Queen* by Mason C.J., was that it attempted to incorporate the substantive law of excessive self-defence and the law relating to burden of proof. This resulted in the use of double negatives which juries found difficult to follow."
D. Lanham, *supra*, fn. 70 at p. 240.

77 D. Lanham, *ibid.*, at p. 249. The writer strongly favoured the revival of the doctrine in the following suggestion: "It is to be hoped that English law, having so firmly set its face against the qualified defence when it was alive and well in Australia, will embrace it with enthusiasm now that it had gone."

2.6 BRIEF REVIEW ON THE DEVELOPMENT OF THE DOCTRINE

As has been discussed above, the doctrine of excessive force in self-defence was popularly regarded as the creation of Australian Common Law.[78] It originated in the case of *McKay*[79] and not very long after the decision of the full Court of the Supreme Court of Victoria, the principle of reducing murder to manslaughter was approved and followed by the High Court of Australia in *The Queen v. Howe*.[80]

The concept of excessive self-defence was however rejected in the Privy Council decision of *Palmer v. The Queen*[81] which was an appeal from the Court of Appeal of Jamaica. The decision of Privy Council was later approved by the English Court of Criminal Appeal in *R. v. McInnes*.[82] The decision of the Privy Council, and its approval by the English Court of Criminal Appeal, influenced the decision-making process in Australian courts. This was due to the fact that judgements in Privy Council cases, whether or not originating from Australia, were considered binding upon the common law courts of Australia. Therefore, there were cases during this period where the doctrine of excessive force was not followed even by the Australian courts.[83]

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78 S. M. H. Yeo, "*The Demise of Excessive Self-Defence in Australia*" (1988) 37 Int. Comp. L. Q. 348.

79 *Supra*, fn. 11.

80 *Supra*, fn. 12.

81 *Supra*, fn. 41.

82 *Supra*, fn. 52.

83 S. M. H. Yeo, *supra*, fn. 78 at p. 349. The writer cites a number of Australian cases which followed the decision of *Palmer v. The Queen*, namely the trial judge's decision in *R v. Viro*, *supra* fn. 5, *Bennett v. Dopke* [1973] V.R. 239. and *Cf. R. v. Olasiuk* (1973) 6 S.A.S.R. 255.

The situation changed as a result of the decision in *Viro v. The Queen*[84] where the court unanimously held that Privy Council cases were no longer binding on the High Court. Mason C.J. approved the concept of excessive force in self-defence and formulated six propositions to be directed to the jury in cases involving the issue of self-defence. Such was the law applicable in the Australian states with common law jurisdiction.[85]

However, the High Court in *Fadil Zecevic*[86] rejected the doctrine and in turn applied the "straightforward conception" of the law of self-defence as in *Palmer*. This decision was described as a great shock to the criminal law fraternity in the common law jurisdiction of Australia.[87] The law after *Zecevic* thus says:

"The question to be asked in the end is quite simple. It is whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did. If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal. Stated in this form, the question is one of general application and is not limited to cases of homicide."[88]

Mason C.J. in his judgement in *Fadil Zecevic supra*, fn. 64 at p. 165 explained that until *Viro*, the judges directed juries in accordance with *Palmer v. The Queen*.

84 *Supra*, fn. 5.

85 The states with common law jurisdictions are New South Wales, Victoria, South Australia and the Australian Capital Territories. The states with a Criminal Code are Queensland, Western Australia, Northern Territory and Tasmania.

86 *Supra*, fn. 64.

87 S. M. H. Yeo, *supra*, fn. 78 at p. 349.

88 *Fadil Zecevic*, *Supra*, fn. 64 at p. 174.

The ups and downs of the doctrine can best be summarised as "a rule which as a matter of abstract justice is right but which in practice leads to the confusion of juries is not one that can be realistically defended."[89]

89 D. Lanham, *supra*, fn. 70 at p. 241.

2.7 EXCESSIVE SELF-DEFENCE AND THE QUESTION OF MISTAKEN BELIEF

The doctrine of excessive force in self-defence was once a particular feature of the law relating to homicide in Australia. Now that this doctrine has been abandoned in favour of English law, the question arises as to how close is the concept now in Australia to that of English law.

As discussed above, the six directives formulated in *Viro v. The Queen* by Mason C.J. specify two situations where the issue of the belief of the accused becomes relevant. The first of these is the belief of the accused in the existence of the attack which potentially threatened him with death or serious bodily harm. In this respect, the jury is under the duty to test the lawfulness of the accused's act on the reasonable belief of the accused based on the circumstances in which he found himself.

The second stage where the question of belief will again become the subject of concern to the jury is in the question of the amount of force used by the accused in exercising his right of self-defence. For this matter, the test of belief is purely subjective - what the accused honestly thought necessary in protecting his life and bodily integrity.

By the abolition of these propositions, the High Court in *Zecevic* had adopted what was usually referred to as a straightforward conception of self-defence. The position now is: what would the accused think necessary in his defence? And was the force used in exercising his defence more than a reasonable man would consider necessary? If the amount of force used by the accused was judged objectively as

more than what a reasonable man would do, even though it was honestly thought to be necessary by the accused, the defence of self-defence has to be rejected and the circumstances will fall to be considered by the jury without reference to that plea.

However, the *Zecevic* and *Palmer's* conception of self-defence leaves one crucial point unresolved. What would be the test required in the event where the accused acts under a mistaken belief as to the situation occasioning the right to defend? For example, a person walking on a street at night time is suddenly approached by someone whom he thinks will endanger his life. That person happens to carry a small hand bag which the accused thinks contained a weapon to be used against him. The accused, believing at that point that his life is in danger, picks up an iron bar which is on the street and hits the deceased with it on the head. It was this blow which causes the death of the deceased. However, it is later discovered that the victim was actually a friend of the accused, trying to frighten him in jest.

In these circumstances, what criterion is to be used by the jury in judging the mistaken belief of the accused? In answering this question, English courts have not been entirely consistent in their solutions.[90] In the case of *Colin v. Chisam*,[91] the Criminal Court of Appeal held that an honest belief of the accused needs to be based on reasonable grounds. In the absence of such honest belief, whether or not that belief satisfies the reasonable man test will not be a subject of discussion by the courts.[92]

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90 *Ibid.*, at p. 242.

91 [1963] 47 Cr.App.R. 130.

92 *Ibid.*, at p. 135.

In the House of Lords decision of *D.P.P. v. Morgan*[93] it was held that if an accused in fact believed that a woman had consented to the act of sexual intercourse, whether or not that belief was based on reasonable grounds, he could not be found guilty of rape. Even though this was not a self-defence case, its decision had a great impact on the later cases which involve the issue of the belief of the accused. However, in the case of *Albert v. Lavin*[94] the Divisional Court took the view that it was no defence to a charge of assault that the accused honestly but mistakenly believed that circumstances existed which would have justified his action as being undertaken in reasonable self-defence unless there were reasonable grounds for that belief.[95]

The decision of the Divisional Court was later disapproved in the case of *Gladstone Williams*.[96] The view taken by Lord Lane C.J. in the Court of Appeal in that case was:

"The reasonableness or unreasonableness of the defendant's belief is material to the question of whether the belief was held by the defendant at all. If the belief was in fact held, its unreasonableness, so far as guilt or innocence is concerned is neither here nor there."[97]

This decision was later referred to and approved in the subsequent case of *Beckford v. R.*,[98] where the Privy Council in approving Lord Lane C.J. commended

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93 [1975] 2 All ER 347.

94 [1981] 1 All ER 629.

95 Lord Justice Donaldson in *Albert v. Lavin*, *ibid.*, at p. 640. In this case the House of Lord's decision of *D.P.P. v. Morgan, supra,* fn. 93 was not followed.

96 [1984] 78 Cr. App. R 276.

97 *Ibid.*, at p. 281.

the decision as correctly stating the law of self-defence. The law as upheld in *Beckford* said: "If a plea of self-defence was raised when the defendant had acted under a mistake as to the facts, he was to be judged according to his mistaken belief of the facts regardless of whether, viewed objectively, his mistake was reasonable."[99]

Supported by these decisions, there is a strong tendency in the English courts to judge the mistaken belief of the accused based on a subjective test of reasonableness. The Australian courts on the other hand were adopting a quite different solution to the problem. In *Viro v. The Queen*, the High Court required the mistaken belief to be a reasonable one, but defined reasonableness not in terms of what a reasonable person would have believed but what the accused might have thought to be reasonable taking into account all the circumstances in which he found himself. It is admitted that the doctrine of excessive force was disapproved in *Zecevic* but as far as the test of reasonableness of the accused's belief is concerned,[100] nowhere in the case is it suggested that this has also been rejected. In fact counsel for the appellant argued for the rejection of the reasonable belief test in favour of the subjective belief of the accused. This contention was conclusively turned down in the majority judgement in *Zecevic*. The test of reasonable belief was still applicable in ascertaining the reasonableness of the accused's conduct.[101]

It is a peculiarity of Australian law that the meaning of reasonable belief could lead to two different perceptions: whether it is a purely objective test of reasonable belief or, as defined by Mason C.J. in his first proposition in *Viro*,

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98 [1987] 3 All ER 425. However the position of *Beckford*'s case in Australian Courts was said to be uncertain. P.A. Fairall, *supra*, fn. 2 at p. 47.

99 *Ibid.*

100 Reference is made to proposition (1) of the directive in *Viro v. The Queen*, *supra*, fn. 5.

101 *Fadil Zecevic*, *supra* fn. 64 at p. 170-172.

reasonable belief in the sense that what the accused would have reasonably believed taking into account the circumstances in which he found himself. The judgement in *Zecevic* had given no clear ruling on this issue. However, since the view of self-defence taken in *Palmer v. The Queen* was the one which was approved and followed in *Zecevic* - and in *Palmer,* reasonable belief means the belief of other reasonable men - it could be said that the Australian courts accept the interpretation of reasonable belief as in the English court.

The meaning of reasonable belief was also discussed in *Glen William Conlon*[102] which was an appeal by the Crown in the Supreme Court of New South Wales. In this case, Hunt C.J. asserted that in order for the Crown to eliminate any possibility that the accused was acting in self-defence, it must prove either the accused did not believe that it was necessary in self-defence to do that act with that intention, or that there were no reasonable grounds for that belief.[103] The Crown contended that the test of reasonableness here means *a completely objective one*. The Chief Justice rejected this argument and was of the view that the question of reasonable belief is to be assessed not by the hypothetical person presumed to be in the accused's position but it is essentially a mixture between the objective and subjective belief of the accused. It is interesting to mention here that Hunt C.J. in deriving that conclusion made a special reference to the case of *Zecevic* where he said:

"But it is clear from the formulation of the issue in *Zecevic v. D.P.P.* that it is the belief of the accused, and not that of the hypothetical reasonable person in the position of the accused, which has to be reasonable."[104]

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102 [1993] 69 A.Crim.R. 92.

103 *Ibid.*, at p. 93.

104 *Ibid.*, at p. 98.

Thus the Chief Justice was of the view that the reasonable belief of the accused in *Zecevic* means the same as it was understood in *Viro*. Hunt C.J., came into this conclusion based on the presumption that Wilson, Dawson and Toohey JJ. did not intend to depart from the nature of the analogous decisions posed in relation to self-defence in *Viro* - which means the judges took the reasonable belief test as a mixed objective and subjective belief of the accused.[105]

The position could not be made clearer when Hunt C.J. proclaimed:

"It seems to me that it would require a very clear statement by the High Court that it had intended to substitute a completely objective assessment for that of a mixed objective and subjective nature as had been posed in *Viro*. No such statement has been made, and the issue does not appear to have been discussed in any case since *Zecevic v. DPP*."[106]

Thus, from Chief Justice Hunt's perspective, by virtue of the judgement in *Zecevic*, the conclusion that can be arrived at was that the assessment of reasonable belief in that case was in conformity with the definition of reasonableness stated by Mason C.J. in *Viro*. However, this conclusion could still be debated on the basis that even though it was admitted that the majority was not explicit in its intention to substitute a completely objective assessment for that of a mixed objective and subjective nature, at the same time it is also unclear whether the reasonable belief was intended to mean exactly the same as the definition of reasonable belief in *Viro*.

Mason C.J. in his separate judgement in *Zecevic*, talked about the similarity between *Palmer* and *Viro* in their insistence on the requirement of reasonable belief

105 *Supra*, fn. 102 at p. 98.

106 *Ibid.*, at p. 99.

before an accused could successfully plead the defence of self-defence.[107] However, what was unclear in his judgement was the kind of "reasonable belief" which was adopted in assessing the belief of the accused in *Zecevic*.

We are left, then, with the following alternative conclusions:

1. The requirement of reasonableness of the accused's belief is of a mixed objective and subjective nature, as enunciated in *Viro*. This is supported by the facts that none of the judges in *Zecevic* makes clear the need for a purely objective test of reasonableness; or

2. It is a reasonableness test based on the hypothetical person's perception. This is based on the fact that as the law in *Viro* was rejected, and it was the Privy Council decision of *Palmer v. R.* that was followed, therefore it is reasonable to presume that it is the belief based on the interpretation of objective reasonableness that has to be adopted.

In conclusion, the decision in the New South Wales Court of Appeal was clear on one aspect - the court accepted the importance of the reasonable man test in judging the reasonableness of the accused's mistake as to the situation occasioning self-defence. (At this point there is a dissimilarity between the present trend in the English courts and the Australian approach as to the matter). And it was also clear that the meaning of reasonable belief adopted is a mixture of objective and subjective nature. However, it is the argument in favour of the said reasonable belief in the context defined in *Viro* which was not entirely convincing. It is to be stressed that the Supreme Court's argument in rejecting a complete objective test of

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107 Mason C.J. in *Fadil Zecevic*, *supra*, fn. 64 at p. 165.

reasonableness was based entirely on a mere presumption. This presumption lacks coherence and is liable to challenge.

Nevertheless, by virtue of the decision in *Glen William Conlon*[108] whether a purely objective reasonableness or a mixed objective and subjective reasonableness test is adopted, this does not alter the fact that the doctrine of excessive self-defence has lost its ground even in the country where it originated.

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108 *Supra*, fn. 102.

2.8 THE CASE OF *GILLMAN*[109]: THE REVIVAL OF THE DOCTRINE?

Despite its rejection by majority of the judges[110] the doctrine still commands the support of the majority of commentators. Lanham has admitted that the law was "too complex" and "too limited" but has rejected the move to completely dismiss the doctrine.[111] Yeo challenged the High Court's decision in *Zecevic* to abolish the doctrine on three grounds: 1) the argument by the majority that the doctrine lacked support from judicial precedent was doubted by the existence of strong support of the concept, notably in *Howe* and *Viro*; 2) the doctrine is supported by the legal principle which declares that a person who honestly believes himself to be applying necessary force in self-defence lack the malice required for murder; 3) the doctrine is more in conformity with the moral culpability requirement of the criminal law.[112]

There has also been criticism of the decision-making process of the English courts in their examination of this doctrine. It has been suggested that the qualified defence merited more serious consideration than the treatment which it received in the English courts.[113] The most serious criticism perhaps comes from the same writer when he said: "in their approach to other areas of criminal law our courts have exhibited a boldness which is regrettably lacking here."[114]

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109 (1995) 19 Crim.L.J. 38.

110 Wilson , Dowson and Toohey JJ. in their joint judgement in *Zecevic*, *supra* fn. 64. Mason C.J. in separate judgement in the same case. Lord Morris of Borth-Y-Gest, in the Privy Council case of *Palmer v. The Queen*, *supra* fn. 41. Edmund Davies L.J. in delivering the judgement in *R. v. McInnes* approved the Privy Council decision in *Palmer* thus rejecting the doctrine of excessive self-defence.

111 D. Lanham, *supra*, fn. 70 at p. 249.

112 S.M.H. Yeo, *supra,* fn. 78 at p. 366.

113 P. Smith, *supra*, fn. 9 at p. 534.

114 *Ibid.*, at p. 534.

There was also a suggestion that the confusion and complexity surrounding the doctrine could be resolved by statutory intervention. It is obvious from the writer's point of view that the moral culpability of the accused who reacts "honestly" but "unreasonably" needs to be adequately dealt with in legislation.[115] Elliott wrote that there is a need for the qualified defence in common law jurisdictions but expressed his regret that the rules defining the qualified defence seem to destroy its usefulness in those cases where it is needed most.[116] Sornarajah viewed the concept from a different perspective; to him in jurisdictions where capital punishment remain unabolished, the need for having the qualified defence as a mitigating factor proves essential in avoiding the extreme punishment of the death penalty.[117]

In 1994 the doctrine of excessive self-defence was reasserted in the Australian courts in *Gillman*,[118] an appeal case in the Court of Criminal Appeal of South Australia. The appellant in this case struck a blow or blows to the head of the deceased with an iron bar and with intention to kill. The appellant did not give evidence but, according to the Crown, had told the police that he had been attacked by the deceased who struck him with an iron bar and kicked him. The appellant claimed that he wrestled the iron bar from the deceased and struck him in self-defence. The main issue was thus whether the appellant had acted in self-defence at the time of striking the blows which killed the deceased. In the trial court the appellant was acquitted of murder but was found guilty of manslaughter.

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115 N. C. O'Brien, *supra*, fn. 30.

116 I. D. Elliott, *supra*, fn. 4 at p. 740.

117 M. Sornarajah, "*Excessive Self-Defence in Commonwealth Law*" (1972) 21 I.C.L.Q 758 at p. 770.

118 *Supra*, fn. 109.

It is to be noted that the law as regards self-defence in South Australia since 12 December 1991 has been embodied in s.15 of the Criminal Law Consolidation Act 1935 (SA). The section was said to have abrogated the common law of self-defence as found in *Zecevic* and takes the following form:

" (1) Subject to subsection (2)-

(a) a person does not commit an offence by using force against another if that person genuinely believes that the force is necessary and reasonable-

(i) to defend himself, herself or another;

or,

(ii) to prevent or terminate the unlawful imprisonment of himself, herself or another; and

(b) a person does not commit an offence if that person, without intending to cause death or being reckless as to whether death is caused, uses force against another genuinely believing that the force is necessary and reasonable-

(i) to protect property from unlawful appropriation, destruction, damage or interference;

(ii) to prevent criminal trespass to any land or premises, or to remove from any land or premises a person who is committing a criminal trespass;

or

(iii) to affect or assist in the lawful arrest of an offender or alleged offender of person unlawfully at large.

(2) Where-

(a) a person causes death by using force against another genuinely believing that the force is necessary and reasonable for a purpose stated in subsection (1);

(b) that person's belief as to the nature or extent of the necessary force is grossly unreasonable (judged by reference to the circumstances as he or she genuinely believed them to be);
and

(c) that person, if acting for a purpose stated in subsection (1) (b) does not intend to cause death and is not reckless as to whether death is caused,

that person may not be convicted of murder but may if he or she acted with criminal negligence be convicted of manslaughter,"

One of the grounds of appeal was that the trial judge had failed to direct the jury properly as to the meaning of "criminal negligence" in the context of s.15 (2). This ground of appeal was accepted in the Court of Appeal; however the court did not say in what way it was at fault, what the proper direction would have been, and what the term "criminal negligence" meant in the context of s. 15. The Court of Appeal asserted that the section was "completely unworkable" and ought to be either repealed or reworded so as to make its meaning clear.

The significance of this section in the context of the discussion on the doctrine of excessive force in self-defence is that by virtue of subsection 2 (a) and (b), the provision suggests that if a person uses grossly unreasonable force resulting in death, but genuinely believes the force used to be reasonable, stands to be convicted of manslaughter - provided that person is found also to have acted with

"criminal negligence". Thus, if a person acted excessively in employing force in self-defence, he would be convicted of manslaughter if the jury is satisfied that he genuinely believed the excessive force to be reasonable and also that he acted with criminal negligence. This, on its appearance, resembles the doctrine of excessive force in self-defence espoused in *Howe* and *Viro*. The only new requirement stipulated in this provision is that the accused must also be negligence in acting in self-defence.

The Court of Appeal in discussing both subsections found it "difficult" to reconcile a finding by the jury on the one hand that there was a reasonable possibility that the accused had the required genuine belief, with a finding on the other hand that such a belief was, even on the facts as the accused believed them to be, "grossly" unreasonable. The court was of the view that to put such an interpretation on the two subsections was to offend against common sense, and could only serve to confuse the jury.[119] This difficulty is not, it has to be said, new. The very reason for the rejection of the theory of excessive defence laid down in *Viro* was also mainly related to the difficulty that the jury might have faced in comprehending the wording of the law.

Section 15 of the Criminal Law Consolidation Act could be said as an attempt to avoid an accused who genuinely mistaken as to the amount of force reasonably required in his defence, to be convicted of murder. However, it is quite unfortunate that this attempt, like that in *Viro*, still causes great difficulty for the judge to explain

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119 The court's view on this point was criticised by one commentator when it was said: "Such interpretation does not, as Mohr J. asserts, offend against common sense. It appears that what his Honour finds repugnant to common sense is the notion that a jury can, on the one hand, find that a belief was genuinely held, and then on the other hand, find that such a belief was, objectively, grossly unreasonable. The two findings are not logically incompatible. A wholly unreasonable belief may nevertheless be sincerely held. A misguided accused may genuinely believe that the force used was necessary and reasonable and yet be wholly unreasonable in holding such a belief. Why should this offend common sense?"
M.Grant, Commentary on the case of *Gillman*, *supra*, fn. 109. at p. 40.

it in plain terms to the jury. Thus any satisfaction that the benevolent doctrine has in the end revived should be tempered by the fact that the South Australian Court of Appeal in its description of the law saw it as "completely unworkable" and took the view that it "ought to be either repealed or reworded so as to make its meaning clearer."

In conclusion, the doctrine of excessive force in self-defence is undoubtedly logical in its essence. Perhaps the best argument supporting the benevolent doctrine lies in common sense. If a person who, in exercising his legal right of self-defence kills his attacker as a result of his misjudgement of the situation, is punishable in the same way as a "premeditated murderer", and if the law-making process is unable to formulate a system for distinguishing the culpability of the two offenders, there must be a serious defect in the criminal law system itself.

2.9 *R. v. CLEGG*[120] AND ITS EFFECT ON THE DOCTRINE OF EXCESSIVE SELF-DEFENCE

The accused in this case was a soldier serving with the armed forces of the Crown in Northern Ireland. On the day of incident, the accused together with other soldiers were manning several vehicle check points at a bridge. A stolen car, which refused to stop at the first check point, moved in the direction of the place where the accused and his unit were on duty. All four members guarding the accused's check point opened fire; the accused himself fired four shots which he claimed to be in self-defence and in defence of a colleague, Pte Aindow, who was standing on the other side of the road. The trial court, divided the four shots into two categories. The first of these covered the three shots which the court said were fired in self-defence or defence of others, namely the defence of Pte Aindow. The second category, which was crucial in these proceedings, consisted of the fourth shot, which was held to be fired with the intention of causing death or serious bodily harm and was therefore not in self-defence. As a result of a scientific finding, it was discovered that the fourth shot was the cause of the deceased's death.

The fatal shot was fired after the car had passed some distance away from the accused, and it was therefore held to be fired with the intention of causing death or serious bodily injury. For this reason, the trial judge decided that the accused was guilty of murder. It is to be stressed that, in the opinion of the trial court, the issue of excessive self-defence did not arise and the case was one of straightforward murder.

The case was then brought before the Criminal Court of Appeal Northern Ireland, and an argument based on Section 3 (1) of the Criminal Law Act (Northern

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120 [1995] 1 All ER 334.

Ireland) 1967, which was previously rejected in the trial court, was considered. This Act reads:

"A person may used such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large."

This was taken into consideration because the accused repeatedly asserted that he fired the fourth shot to stop the car, thinking that his colleague had already been struck. In this matter, the question for the Court of Appeal was whether the force used by the appellant was reasonable within the definition of the Act. The Court of Appeal decided that the amount of force used, namely, the fourth shot fired by the appellant, was "grossly disproportionate to the mischief to be averted" and accordingly dismissed the appeal.

The importance of the judgement by in the Criminal Court of Appeal stems from the fact that a distinction was suggested by Hutton L.C.J. between a killer motivated by the need to protect himself or the life of others, and a killer with an unmitigated intention to kill. The court accordingly emphasised that there is an important difference between the killing committed by the appellant and other murder cases involving an evil motive and an intention to kill. Thus it was said that to uphold the conviction of the appellant for committing the crime of murder did not actually reflect the nature of the offence which he had committed. The court in its observations did not hide its preference for the accused to be convicted of manslaughter,[121] and indeed there was a sense of regret over the absence of a

121 The full citation of the Court of Appeal's decision was quoted at p. 338-339 in *R v. Clegg*, *ibid.* The last part of the decision thus reads: "Whilst it is right that he should be convicted for the unlawful killing of Karen Reilly, we consider that a law which would permit a conviction for manslaughter *would reflect more clearly* the nature of the offence he had committed."

provision allowing for a manslaughter verdict.[122] The Appellate Court, therefore, called upon Parliament to consider making changes in the existing law relating to the concept of self-defence.

This observation was given serious attention by the House of Lords in considering the appellant's appeal. The question for the opinion of the court was whether the existing law allows a verdict of manslaughter instead of murder where the force used in self-defence is excessive. The Law Lords were also faced with the question whether they were in the position to make such a ruling in the absence of a provision in the current law.

Lord Lloyd of Berwick saw no reason to entertain such a mitigating factor. The main reason put forward by him was that at the time when the fourth shot was fired the car had already passed and the occasion conferring the right to defend was accordingly over. The issue of self-defence, let alone the consideration of excessive self-defence, had thus become irrelevant.

In the course of the judgement, the House however found it necessary to discuss the issue of excessive force in self-defence. The House concluded that the demise of the doctrine in Australia, by virtue of the case of *Fadil Zecevic*, the rejection of the doctrine in the Supreme Court of Canada in *R. v. Gee*[123] and *Brisson v. R.*[124] and the complete rejection of the doctrine in English courts particularly with

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122 Lord Lloyd in the House of Lords admitted: "I have already mentioned some of the arguments in favour of changing the law when dealing with the third question. (the question of the defence of excessive defence) They have never been expressed more persuasively, or with greater insight, than they were by the Court of Appeal in the present case." *R. v. Clegg*, *ibid.*, at p. 345.

123 (1983) 139 D.L.R. (3d) 587.

124 (1983) D.L.R. (3d) 685.

reference to the decision of the Privy Council in *Palmer v. R.*., meant that the doctrine is now a matter of history.

Nevertheless a positive feature of the discussion of the doctrine in the House of Lords as well as in the Court of Appeal was that despite the rejection of the doctrine, there is nothing in the judgements suggesting that there is a serious defect in the doctrine which makes it completely unacceptable. The rejection was rather 1) related to the facts of the case based on the evidence produced in the courts (particularly the scientific evidence suggesting that the fourth shot was the main cause of the deceased's death) and, 2) based on the fact that the court found it necessary to disregard the doctrine since it had never been formally recognised in the English courts, and countries where the doctrine was once accepted, had now returned to the mainstream of Commonwealth and particularly English Common Law thinking on the matter. The judgements did not suggest that the application of the doctrine would lead to results which were in any way repugnant to justice. [125]

It would not be an over-statement to claim that based on the manner in which the judgements were concluded, both the Court of Criminal Appeal and the House of Lords had realised and admitted the importance of the doctrine. This is significant in that now the most authoritative body in the judicial system had at least recognised its importance. Hutton L.C.J., in delivering the judgement in the Court of Appeal, was

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125 S. Doran, in her article "*The Doctrine of Excessive Defence: Developments Past, Present and Potential*" (1985) 36 Northern Ireland Law Quarterly 314 at p. 320 said:
"Furthermore, it is worth emphasising that in the leading Privy Council case of *Palmer v R*, which is widely recognised as the most authoritative rejection of the Australian development, counsel for the Crown did not launch a wholly unequivocal attack on the excessive defence doctrine. Indeed, he began as follows: The *Howe* doctrine, if correct, is of limited application only; it is inapplicable where (a) self-defence was totally unnecessary in the manner in which the accused acted; and (b) the prosecution's case is totally opposed to the case for the defence. . . " Clearly he saw some room for a middle-ground in a factual situation which fell obviously into neither the murder nor acquittal bracket; but on his view a direction on excessive force would be only very limited exception to the all or nothing rule."

quite direct in calling for Parliament to make a change in the law to allow the doctrine. The House of Lords made it clear that without such a provision from Parliament, the House was not in the position to alter the existing law.[126] The question now is: how much longer should the courts wait for legislative intervention?

2.9.1 *Observations on R. v. Clegg*

One aspect of the judgement which need further discussion is this: both the House of Lords and the Court of Appeal paid very little attention to the belief of the accused. The reason for the rejection of the excessive defence defence was, as mentioned, primarily based on the fact that the danger which occasioned the right to exercise force in defence had passed. However, did the accused in this case knew about this fact? Did he fire the fourth shot in the belief that the life of his colleague was in serious danger? Or did he fire the controversial shot with an intention to kill the passengers or cause them serious bodily injury? These are the areas to which attention should be paid.

According to Private Clegg, he fired all the four shots in the belief that the life of his colleague was seriously threatened, or, as he asserted in the Court of Appeal, he thought that Pte Aindow had indeed been struck by the car. This fact would mean that his act was intended to allow for the apprehension of a criminal, or one he believed to have been a criminal, and his act was thus within the meaning of section 3 (1) of the Criminal Law Act (Northern Ireland) 1967. Should this belief not deserve some consideration?

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126 Lord Lloyd in his judgement said: "The reduction of what would otherwise be murder to manslaughter in a particular class of case seems to me essentially a matter for the decision by the legislature, and not by this House in its judicial capacity."
R. v. Clegg, *supra*, fn. 120 at p. 346.

The accused's culpability in the case under discussion appears to have been judged merely on the externals of his act without any reference to his belief at the time. One would argue that to achieve a just result the accused's belief should be given sufficient consideration.

Now, supposing the court had erred in not giving necessary consideration to the accused's belief, would it make any difference to the final outcome of the case if the belief were now to be considered? It could be argued that the distinction made in the trial court between the first three shots and the fourth, a distinction accepted in the Court of Appeal and approved in the House of Lords, is in itself arguable. Would it be right to say that the first three shots were fired in self-defence whereas the fourth was not? Or would it be necessary to make a distinction between each and every shot at all?

It could be suggested that all four shots were fired by the accused "in the belief" that they were necessary to prevent a felony or to arrest a felon. So whether the first or the fourth shot caused the death of the deceased would not necessarily be a deciding factor. The point is that, based on the accused's belief, all the shots were fired in his attempt to arrest the offenders or those whom he believed to be the offenders. (This argument is put forward taking into consideration the accused's version of the story as accepted in the Court of Appeal, that is, that he fired all the shots in the belief that Pte Aindow had already been struck). Therefore, his criminal liability would also depend on the belief under which he was labouring in that particular set of circumstances.

The point now should be whether the accused's belief could exonerate him from being held criminally liable. When discussing the issue of belief, it is to be

borne in mind that it has been accepted that necessity and proportion are the two important ingredients in deciding the issue of self-defence. The belief of the accused in any case of self-defence thus has to be determined in two situations:

1) the belief as to the situation occasioning the right to defend and

2) the belief of the accused as to the amount of force necessary in the defence.
The present case particularly concerned the belief of the accused as to the amount of force supposed to be used in his defence.

The answer to the question above would most likely be in the affirmative. If so, the next issue would be: what kind of belief could absolve the accused from the purported offence he had committed? By virtue of the decision in *Palmer v. R.*[127] the belief of the accused is examined by a wholly objective reasonable man test. If the jury is satisfied by the prosecution that the accused had done more than what would otherwise be reasonably necessary, then it should convict. Conversely, if the jury finds that the amount of force used was reasonably necessary, there is a good chance of a complete acquittal for the accused.

By virtue of this decision there is a possibility that the prosecution could successfully prove the case against the accused, which consequently would lead to his conviction. But if the prosecution fails to exclude the accused's defence, there is an equal opportunity for him to obtain a complete acquittal. It is up to the jury to decide whether the accused's belief regarding the amount of force necessary in the defence is reasonable or not. The positive aspect of this approach is that there is always an equal chance for conviction and acquittal. This is different from the way

127 *Supra*, fn. 41.

the present case was decided where the belief of the accused was completely ignored.

In Australia, by virtue of the High Court's decision in *Fadil Zecevic*, the doctrine of excessive defence has been abandoned. The High Court confirmed the "all or nothing" principle as laid down in *Palmer v. R.*. However, there is a dissimilarity between the Australian court and the English court in relation to the test of the accused's belief. Whereas the English court viewed it as a wholly objective test, the former adopted a mixed subjective and objective standard of reasonableness. The situation in Australia would thus be: the accused's belief would have to be reasonable, but it has to be reasonable based on the circumstances on which he found himself. Even though there may be difficulty in understanding this test, the fact is, the accused would not be judged merely by his act. It is possible that, if *Clegg's* case arose in an Australian court, the jury might be satisfied that his act was reasonable based on the circumstances on which he found himself, and so there would be a chance of an acquittal.

2.9.2 Further points in *R. v. Clegg*

Another point for discussion in relation to *Clegg's* case is this: what would happen if the accused fired ten shots at the deceased - which appears to be excessive - but later it was discovered that the first shot was in actuality the main cause of the deceased's death. Would the accused be acquitted by reason of the fact that the first three shots were in self-defence? Would the court in this case make a distinction between the first three shots (which were said to be within the ambit of self-defence) and the rest (which were not)?

To achieve a just solution in a situation such as this, the accused's belief has to be properly taken into account. If the jury is satisfied beyond doubt that the accused had reasonably believed the amount of force employed was necessary, or the prosecution fails to prove beyond doubt that it was not reasonably done in self-defence, even though ten shots were fired, the accused could still have a chance of an acquittal. If on the other hand, the prosecution successfully proved beyond doubt that the shots were unreasonable, he would be convicted. The process would be different if the court started to ascertain the actual shot which caused the death of the deceased. The situation would arise where even if in the belief of the accused the amount of force used was reasonable, the accused would still be convicted of murder.

Another point which arises is what would be the consequences if the main cause of the deceased's death were the fatal injury suffered by the deceased from the first and the fourth shot? The case would thus be too complicated if the same approach was taken as in the trial court. The first shot would entitle the accused to rely on self-defence but the fourth shot would be said to have been fired with the wicked intention to cause death or grievous bodily harm by reason of the fact that it was too late and that the danger was over. The accused would then be acting in self-defence as well as not acting within the scope of the defence. In this situation the liability of the accused would be difficult to decide.

Therefore it seems that to reaching a conclusion without giving due consideration to the belief of the accused is not the best way to deal with such a highly controversial case. Even though by referring to the *Palmer* approach in this case, the accused could still be convicted of murder, there is always a chance for the accused to have his case for self-defence successfully pleaded and thus to be acquitted.

2.9.3 Looking at the courts' objective in the decision of *R. v. Clegg*

What intention has the court, particularly the Court of Appeal and the House of Lords, in approving the trial court's reasoning behind the accused's conviction? (namely the conclusion reached that the first three shots were in self-defence and the fourth was not)? This question is vital, as it effects the future attitude of the court in self-defence cases. The immediate thought that comes to the mind of every judge would probably be that it serves as a reminder that the claim of self-defence should be confined essentially to a genuine case of necessary self-defence. It has been accepted as a good principle that self-defence must not be made a mean to justify one's act of revenge or resentment towards others. A person must not take an opportunity arising from necessity to execute his own private revenge. Perhaps the requirement of having a detailed examination of the accused's use of force is intended to safeguard the authenticity of the claim of self-defence. This idea is certainly well understood and deserves support.

However, the intention to allow only a genuine claimant to succeed in a self-defence plea should not at the same time be achieved by adding another strict precondition to the doctrine. The requirement of having to examine each and every blow struck, or shot fired or any other means of force used in the defence[128]- which was the actual cause of the deceased's death - without looking at the belief of the accused as to the occasion, would appear to be to the disadvantage of the accused.

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128 As could be inferred from the decision of *R. v. Clegg*, *supra*, fn. 120.

2.10 CONCLUSION

i. In *R. v. Clegg*, the main point of criticism centers on the fact that the court rejected outright the accused's plea of self-defence and the doctrine of excessive self-defence. This decision was arrived at after establishing that the four shots fired by the accused were partly accepted as an act of justifiable self-defence and partly unjustifiable and not within the ambit of self-defence. Since the actual shot which caused the death of the deceased was the fourth one, and in the opinion of the court fired after the need for a defence was over, it was a shot fired with the intention of committing the crime of murder and thus the accused had committed a crime which required to be punished severely by the law. In reaching this judgement it appears that the accused's belief regarding the occasion was not sufficiently entertained. It could be argued that, were the belief of the accused to be considered, the outcome of the case would be more favourable to him and the distinction made between the four shots fired by him would not be essentially necessary.

ii. It was unfortunate that Pte Clegg was convicted of murder at the time as the Court of Appeal unhesitatingly recognised the reasonableness of the doctrine of excessive defence which, if allowed, would render him guilty only of manslaughter. It was more unfortunate that his appeal to the House of Lords was dismissed just for the reason that the Law Lords found it not within their judicial powers to approve officially the doctrine of excessive defence where unofficially, the House seems to agree with the observation made in the Court of Appeal.

The rejection of the doctrine of excessive force in self-defence in this case proves that there is an urgent need for the reconsideration of the law. A distinction between a person of wicked intention killing his victim in cold blood and a person

killing as a result of a misjudgement of a situation or having to make a decision at a moment of unexpected anguish, without time for measured reflection, seems compelling and unavoidable. To convict a person of murder under such pressing circumstances, would be tantamount to putting him on the same footing as a cold blooded murderer. This, as Hunt L.C.J observed, could not be accepted by any fair-minded citizen who would prefer to see him be convicted of the lesser crime of manslaughter.

It is also clear that the doctrine of excessive force in self-defence has never been rejected on the ground of the basic principle underlying it. The merits of the doctrine have long been appreciated. It is quite encouraging, particularly to those who are in favour of the introduction of the doctrine in English courts, that now even the highest body in the judicial system has appreciated the importance of the doctrine. The only set-back is the absence of legislation on the doctrine. The argument for reconsideration of the law will most probably continue in future cases, and Parliament may in the end find it necessary to intervene.

Finally, the doctrine of excessive defence was rejected in the Privy Council in the case of *Palmer v. R.*, in the Criminal Court of Appeal in *R. v. McInnes* and now in the present case, in the House of Lords. The rejection of the concept in the two previous cases was quite firm and explicit. But twenty four years after it had apparently been categorically rejected, there is evidence that the courts have started to take a more lenient approach. Thus, the wish of one lawyer to have the English court "embrace the qualified defence with enthusiasm" would now seems not to be too ambitious.[129]

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129 D. Lanham, *supra*, fn. 70 at p. 249. The writer states: "the principle of excessive self-defence adopted in Viro was at the same time too complex and too limited. For that reason it needed to be revised. It did not deserve to be rejected. It is to be hoped that English law having so firmly sets its face against the qualified defence when it was alive and well in Australia, will embrace it with enthusiasm now that it has gone."

CHAPTER THREE

THE DEFENCE OF SELF-DEFENCE IN THE CANADIAN CRIMINAL LAW[1]

3.1 THE PROVISIONS ON SELF-DEFENCE IN THE CANADIAN CRIMINAL CODE

The law of self-defence in Canada is explained in various provisions in the Canadian Criminal Code. The Code distinguishes between the situation where the accused is the victim of an unprovoked attack upon himself and that where he begins the assault or provokes another person to attack him. The first category of the defence of self-defence is contained in section 34 (1) and (2) of the Code.[2] Section 34 (1) says:

"Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself."

The defence of self-defence in this particular section, if successfully pleaded, provides the accused[3] with a full justification and a complete acquittal. Nevertheless,

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1 I do not intend to elaborate every issue arising from the provisions quoted in this chapter. The reason for highlighting those provisions, however, is to state the law of self-defence in the Canadian Criminal Code as they might be relevant in the later discussions on the doctrine of excessive defence in Canada.

2 D. Stuart, "*Canadian Criminal law*" (2nd ed. 1987), at p. 405. This section has been described as the key provision upon which most defences of self-defence depend.

for this result to be achieved, the law stipulates several prerequisites. The first requirement emanating from this section is that those who intend to seek refuge under it must be the subject of an unlawful assault, and it is important, too, that the unlawful assault is not the result of one's own act of provocation. It is apparent from the language of this part of the section that where the accused caused himself to be assaulted it can scarcely be of any assistance to him.

The second condition is related to the repelling force exercised by the accused in his defensive act. Here, the accused is required not to have intended to cause death or grievous bodily harm to the victim. The third condition laid down in the above quoted provision makes it obligatory upon the accused not to employ more force than would be necessary at that particular point. It would not be erroneous to construe the words "no more than is necessary" to mean the accused must be proportionate in his defensive act.[4]

In short, even though this particular provision is meant to provide grounds for the act of self-defence, it is only of limited application. The limitation is due to the conditions explained within the language of the law itself.

Section 34 (2) also falls within the category of self-defence against unprovoked assault. This subsection says:

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3 The term "accused" in this work refers to the defender, that is, the one who claims to exercise the right of self-defence.

4 It has been commented that:
"It would be a legitimate linguistic construction to interpret the section to require a test of proportionality between the force used by the attacker and that used by the defender, judged ex post facto on an entirely objective basis in which the belief of the defender is irrelevant."
D. Stuart, *supra*, fn. 2 at p. 407.

"Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if

(a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes, and

(b) he believes, on reasonable and probable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm."

As in the case with the previous provision, the accused relying on this part of the law also must be the subject of an unlawful assault in the sense that the attack confronted him must not be the result of his act of provocation or must not also be the result of a retaliation on the part of the other party to the accused's original attack against him. However, in contrast to subsection (1) of section 34, the accused would be justified even if he intentionally kills or causes bodily harm to his assailant. Whereas the previous provision does not specifically mention the result of the accused's act of self-defence, this subsection makes it clear that the accused's defensive act resulted in the death of his assailant or caused him (the attacker) serious bodily injury.[5]

Under subsection (a) of the provision, the accused's act of causing the death of the aggressor or causing him serious bodily injury would only be justified if the jury were satisfied that the nature of the attack he encountered was so seriously violent as to put him under reasonable apprehension of death or grievous bodily

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5 The previous subsection does not state the ultimate result of the accused's act. However, it would be legitimate to interpret it as foreseeing the death or serious injury of the attacker in the event where the jury is satisfied that the act of killing or causing the attacker fatal injury is really "necessary" to ward off the attack. The fundamental requirement is that the repelling force must be proportionate to the danger.

harm. At this point, a question may be asked as to how the accused's reasonable apprehension of death or serious bodily harm should be ascertained? It was decided in the case of *Regina v. Bogue*[6] that the applicable test is a purely objective one.

Referring to subsection (b) of the provision, in exercising his defensive force resulting in the death of the attacker or causing him serious bodily injury, the accused must have believed, on reasonable and probable grounds, that the act of killing the attacker or inflicting on him serious injury is the only alternative available to him in preserving his life and physical integrity. The point of discussion now is centered on the test of reasonable belief of the accused. The case of *Regina v. Bogue*[7] again provides some clarification. In this case the Ontario Court of Appeal decided that subsection (b) imported a subjective element based on an objective standard. In the court's own words:

"There are two criteria to be satisfied under s.34 (2). The reasonable apprehension of death or grievous bodily harm in s.34 (2) (a) must satisfy an objective standard. In addition, s.34 (2) (b) imports a subjective element, the belief of the accused that he cannot otherwise preserve himself form death or grievous bodily harm. However, this belief must meet an objective standard that it is based on reasonable and probable grounds."[8]

The application of section 34 (2) subsection (a) and (b) is best explained in the case of *R. v. Baxter*,[9] where Martin J.A., in delivering the judgement of Ontario Court of Appeal, concluded that:

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6 [1976] 30 C.C.C. (2d) 402 at p. 407.

7 *Ibid.*

8 *Ibid.*, at p. 407.

9 [1975] 27 C.C.C. (2d) 96.

"Under section 34 (2) of the Code the ultimate question for the jury is not whether the accused was actually in danger of death or grievous bodily harm, and whether the causing of death or grievous bodily harm by him was in fact necessary to preserve himself from death or grievous bodily harm, but whether:

1. He caused death or grievous bodily harm under a reasonable apprehension of death or grievous bodily harm, and

2. He believed on reasonable and probable grounds that he could not otherwise preserve himself from death or grievous bodily harm."[10]

The point of difference between the two parts of the section is that whereas section 34 (1) requires a strict proportionality rule, tested objectively, section 34 (2) (a) and (b) requires no such precondition. The consequence of this is that, in a case where a direction is given in effect requiring the accused not to be excessive in his defence, this direction is, in its substance, erroneous by virtue of the fact that section 34 (2) (a) and (b) only make it incumbent upon the jury to be satisfied of the accused's reasonable apprehension of death or grievous bodily harm and his belief on reasonable and probable grounds that he cannot otherwise preserve himself from death or grievous bodily harm. Therefore no proportionality test is necessarily to be found in subsection (a) and (b) of section 34 (2).

In short, the application of this section has not always been as straightforward as it appears to be. It has been stated that: "It is difficult to escape the conclusion that section 34 (2) is too complex and that recent interpretations have resulted in intricate and sometimes contradictory analysis."[11]

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10 *Ibid.*, at p. 107.

11 D. Stuart, *supra*, fn. 2 at p. 410.

As the law in section 34 (1) and (2) requires the accused not to be the party starting the assault, section 35 of the Criminal Code provides a justification for an accused who is originally the aggressor. The section says:

"Every one who has without justification assaulted another but did not commence the assault with intent to cause death or grievous bodily harm, or has without justification provoked an assault upon himself by another, may justify the use of force subsequent to the assault if

(a) he uses the force

(i) under reasonable apprehension of death or grievous bodily harm from the violence of the person whom he has assaulted or provoked, and,

(ii) in the belief, on reasonable and probable grounds, that it is necessary in order to preserve himself from death or grievous bodily harm;

(b) he did not, at any time before the necessity of preserving himself from death or grievous bodily harm arose, endeavour to cause death or grievous bodily harm; and

(c) he declined further conflict and quitted or retreated from it as far as it was feasible to do so before the necessity of preserving himself from death or grievous bodily harm arose."

From its wording, it is apparent that the section is specially intended to cover the case of those who, in their act of defence, are in fact the original trouble makers.

Nevertheless, if it is established in court that the accused, in his initial assault against the attacker, intends to cause him death or grievous bodily injury, this provision will offer no assistance. Perhaps this section presumes that those who assault others without intending to cause death or serious bodily injury are at the same time only attempting to commit a minor offence and those who intend to cause death are planning to commit a major offence. Thus, this section is not designed to provide justification for offenders who intend to commit a major offence.

The section, like section 34 (2), does not embody a proportionality test. This means that, even though on the face of it the amount of force used is more than what would seem to be necessary, if the jury is satisfied that it was reasonably done to preserve the accused's life from death or serious injury, the repelling force will be fully justified. It could also mean that where the accused reasonably believed that the repelling force used is justifiable, there can be no room for it to be held excessive. Only if he does not reasonably believe that his defensive act was necessary is his defence excessive. In that situation this section again cannot provide him with any ground of defence.

Despite the fact that this provision is capable of presenting the original aggressor with a total justification, it lays down very strict conditions. It requires the accused to have a reasonable belief that force is needed to protect himself against the attack; the court must also be satisfied that the accused has not intended to cause death or grievous bodily harm. In addition, it is also required that the accused has no reasonable opportunity to retreat before the necessity arose. The fact remains, though, that this section does not provide any room for the application of the doctrine of excessive defence.

Section 37 of Canadian Criminal Code is another provision which provides justification for an act of self-defence. Section 37 reads:

> "(1) Every one is justified in using force to defend himself or any one under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it.
>
> (2) Nothing in this section shall be deemed to justify the willful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent."

This section extends the scope of self-defence to the defence of others. It is possible that in a case where the plea of self-defence relies on this section, the court would have the task of ascertaining the meaning of "any one under his protection" in the wording of the section. This subsection requires the application of the proportionality rule to justify the accused's act of defence. Subsection (2) makes it clear that any force used in the defence, if excessive, will jeopardise his chance of getting the protection of this section. It is therefore essential to point out that where the amount of force used is excessive, there is no suggestion that the doctrine of excessive defence may then be invoked. The straightforward interpretation of the section would suggest that, in failing the test of proportionality, the accused person will fail in using this section as a defence and his culpability is then decided according to his intention at the time of committing the act.

Another provision in the Canadian Criminal Code that is often used in the plea of self-defence is Section 27.[12] This is not specifically a provision relating to

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12 In the case of *Regina v. Gee* (1983) 139 D.L.R. (3d) 587, the trial judge considered the defence of self-defence under section 34 and justification under section 27 of the Criminal Code.

self-defence as such but, rather, provides a justification for the use of force in preventing the commission of an offence. The law states:

> "Every one is justified in using as much force as is reasonably necessary
>
> (a) to prevent the commission of an offence
> (i) for which, if it were committed, the person who committed it might be arrested without warrant, and
> (ii) that would be likely to cause immediate and serious injury to the person or property of anyone; or
>
> (b) to prevent anything being done that, on reasonable and probable grounds he believes would, if it were done, be an offence mentioned in paragraph (a)."

This provision makes it a requirement that the force used, even though considerable, be reasonable. If unreasonable force is used to prevent the commission of a crime, section 27 is therefore inapplicable. By virtue of its reasonable belief requirement, the provision provides no space for the introduction of the doctrine of excessive defence.[13]

Section 8 (3)[14] of the Canadian Criminal Code

This section provides the possibility of accepting any rule and principle of common law in Canadian courts. The law states:

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13 This was confirmed in the case of *R. v. Gee* where Dickson J. in his judgement said: "In my view, it cannot be said that force can be partially justified. Success under s. 27 leads to acquittal. If the defence under s.27 does not succeed, the jury should render the verdict which would have been rendered absent s. 27."

14 Formerly section 7 (3) of the Code.

"Every rule and principle of the common law that renders any circumstances a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of Parliament, except in so far as they are altered by or are inconsistent with this Act or any other Act of Parliament."

In the case of *Regina v. Gee,*[15] McDermid J. in the Alberta Court of Appeal upheld the view that the doctrine of excessive force in self-defence could be introduced in the Canadian courts through this section of the code. But the position is not as simple as it appears to be. As stated in the provision itself, very strict conditions have to be fulfilled. The argument for the introduction of Common Law principle in the courts has always been turned down, mainly on the grounds that the section makes it a condition that the common law rule intended to be applied must not contradict Canadian statutory law. The rule also cannot be invoked if the same matters are already dealt with in Canadian statutory law.

In summary, despite the fact that it has been argued that section 8 (3) provides room for the operation of the qualified defence in Canadian courts, it is evident that not one of the quoted statutory provisions suggests that there is any place for the direct application of the doctrine of excessive defence.

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15 (1983) 139 D.L.R. (3d) 587 at p. 596. This case will be discussed in detail later in this chapter.

3.2 THE DOCTRINE OF EXCESSIVE SELF-DEFENCE IN CANADA

The earliest case decided in Canadian courts returning a verdict of manslaughter when an accused had acted to defend himself, but was excessive in his defensive act is *R. v. Barilla,*[16] a decision of the British Columbia Court of Appeal.

The facts of the case were that the accused had joined in a party held in a friend's home. An argument broke out between the accused's friend and his neighbour. The accused later took part in the quarrel in his friend's side. The argument became more serious and the accused fired three shots from his rifle into the floor to frighten the friend of his neighbour with whom they had the argument.

The neighbour returned with two other men. They knocked at the door, the accused opened it and with the revolver pointed at the deceased, (who was brought by the neighbour to help him) said "get out or I will let you have it". The deceased disregarded the warning and moved forward. The accused then shot him fatally.

The trial judge instructed the jury that if this account of the case were accepted, the only possible verdict would be one of murder, of which the accused was subsequently convicted. In the Court of Appeal, this direction was said to have substantially influenced the jury in delivering their verdict. The direction was held to be wrong. The Court of Appeal felt that the jury was not properly instructed. The reason behind the shooting had not been properly dealt with by the trial judge.

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16 [1944] 4 D.L.R. 344.

In the opinion of the Appellate Court, the jury should have been told that if they found that firing the revolver as the deceased did was an unnecessarily violent act of self-defence, it was open to them to find a verdict of manslaughter. The Court of Appeal concluded that murder was not the proper verdict and allowed the appeal and substituted a verdict of manslaughter.

In its judgement, the Court of Appeal relied on a series of English cases which returned manslaughter verdicts in cases of this nature.[17] The Court concluded that the accused should be convicted of manslaughter based on the argument that the trial court had failed to give weight to the fact that the accused, in committing the act, did so as a result of pressing circumstances. The fact that the neighbour brought two other men - which would certainly have affected the accused's belief of the danger he was facing - was not stressed to the jury.

In summary, three factors could be said to have influenced the Appellate Court's decision: firstly, the failure of the trial judge to emphasise the importance of the background of the case and its effect on the accused in exercising his defensive act; secondly, the moral culpability argument, where the court expressed the view that to have the accused convicted of murder did not truly reflect the accused's blame worthiness in the case; and lastly the availability of the "middle path" rule, derived from English authorities, convinced the Appellate Court that to hold the accused who used, as the Appellate Court put it, "unnecessary violent act of self-defence", guilty of manslaughter is not a completely new departure.

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17 *Mead's and Belt's* case, 168 E.R 1006, *R. v. Smith* (1837) 8 Car & P. 160, 173 E.R 355, *R. v. Odgers* 174 E.R 355.

Regina v. Ouellette.[18]

The Court of Appeal decision in *R. v. Barilla*[19] was approved and reasserted in the subsequent case of *R. v. Ouellette*. In the trial court, the judge in his direction to the jury, explained at great length the conditions of self-defence. He insisted, first of all, on the importance of the defence as derived from the concept of necessity. Secondly, the force used, according to him, must not be more than was necessary. Thirdly, the jury must be satisfied that the accused was acting under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made. Over and above these requirements, the trial court stressed the importance of the requirement of what would now known as a "duty to retreat".

Even though the trial court in detailing the conditions of the defence did mention the point that the defence must not go beyond what would be necessary, the outcome in a case where the defence was indeed more than necessary was not discussed. On this point the Appellate Court found the decision, or rather the trial judge's direction, to be insufficient and defective.

Sloan C.J.B.C criticised the trial court in failing to direct the jury on excessive self-defence. He ruled that in a case of self-defence, the verdicts open to the jury should be, either guilty of murder, guilty of manslaughter and not guilty, stating:

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18 [1950] 98 C.C.C. 153. This case was decided on the 5th of October 1950 in the British Columbia Court of Appeal.

19 *Supra*, fn. 16.

"You have three verdicts you can render in this case: guilty of murder, guilty of manslaughter, and not guilty. I have advised you that provocation reduced murder to manslaughter, that self-defence in the circumstances I have indicated was a justification and entitles the accused to an acquittal . . . . .They (the jury) were not instructed, as they ought to have been, that if they found the appellant acted in self-defence but used more force than was necessary under the circumstances, they should bring in the verdict of manslaughter. In my view on the facts and circumstances of this case, depriving the appellant of this defence was prejudicial to him."[20] The majority judgement quashed the conviction and ordered a new trial.

O'Halloran J.A., in a minority judgement, expressed the view that the accused should directly be convicted of manslaughter and there was no need to order a new trial. The reason for this was that in a new trial there would still be a possibility that the accused could have been convicted of murder, whereas the facts showed that there could be no true verdict of murder. At the same time, the case showed that the accused had done more than was necessary in his defence and he could not believe that any jury acting rationally could acquit the accused. Thus the only proper verdict should be one of manslaughter on the ground of excessive self-defence.

Accordingly, even though there was some conflict of judicial view as to the final judgement,[21] the judges were in total agreement as to the need for the trial judge to give instruction to the jury in line with the principle embodied in the doctrine of excessive self-defence.

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20 *R. v. Ouellette*, *supra*, fn. 18 at p. 157.

21 The majority judgement delivered by Sloan C.J.B.C. ordered a new trial whereas in his minority judgement, O'Halloran J. expressed the view that the accused should be convicted of manslaughter.

The issue of excessive self-defence was again dealt with in the British Columbia Court of Appeal in the case of *Regina v. Stanley.*[22] In this case "uninvited guests" intruded into the accused's house at about two o'clock in the morning. Five people altogether, all of whom were heavily intoxicated, some of whom the accused knew and some he had not recognised, forcefully entered his house. The accused in his defence of himself and, as he also claimed, defence of his dwelling, fatally stabbed one of the intruders.

At the trial court, the accused was found guilty of murder. In the Court of Appeal the trial judge's direction was held to be erroneous. It was decided that a new trial should be conducted and that the charge should be the lesser one of manslaughter.

The Appellate Court admitted that there was ample authority to support a strong theory of self-defence and of a defence of one's home or real property.[23] The question then presenting itself for solution by the court was, in the event that the jury was not satisfied that the accused was acting within the definition of section 34 and 40, what crime did the accused commit? The trial court had found him to be guilty of murder. The Court of Appeal on the other hand, in its judgement elaborated:[24]

"The real question for determination by the jury in this case was whether or not Stanley in the circumstances proven in evidence used excessive force under section 34 (1) or caused the death of Blosky by the use of excessive force without a

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22 [1977] 36 C.C.C. (2d) 216. This case was decided on the 10th of May 1977 in the British Columbia Court of Appeal.

23 At this stage the court referred to the case of *Semaynes* 77 E.R. 194, in which case a general rule was approved: "That the house of every one is to him as his (a) castle and fortress, as well as his defence against injury and violence as for his repose. . . . "

24 *Regina v. Stanley*, *supra*, fn. 22 at p. 232.

reasonable apprehension of death and without a belief based upon reasonable or probable grounds that he could not otherwise preserve himself or Debbie from death or grievous bodily harm.

If the force used was not excessive and/or if the death was caused with the justification offered in s. 34 (2) (a) and (b) then he, Stanley, was justified in killing Blosky and was not criminally responsible.

On the other hand if the force used was excessive or if the death was caused in circumstances not coming within the justification offered in s. 34 (2) (a) and (b) and if there was not an intent within s. 212 (now 229) then the death was caused by an unlawful act but not in circumstances amounting to murder."

The Appellate Court allowed the appeal and ordered a new trial on an indictment for manslaughter only and not murder. Although this decision was not a new approach to a case of such a nature, Branca J.A., in delivering the court's judgement, made no reference to previous authorities, particularly the case of *R v Barilla*. The judgement in line with a "middle path" rule was based essentially on moral culpability reasons. Nevertheless, the importance of this case lies in the fact that the doctrine of excessive-defence was once again upheld in the Appellate Court of British Columbia The moral culpability argument again seemed overwhelming.

In the case of *Regina v. Basabaras and Spek*[25] those cases approving the doctrine were referred to and discussed.[26] The court acknowledged the availability of

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25 [1981] 62 C.C.C. (2d) 13. This case was decided on the 18th of August 1981 in the British Columbia Court of Appeal.

26 The court referred to the cases of *R. v. Barilla*, *supra*, fn. 16, *R. v. Ouellette*, *supra*, fn. 18, *R. v. Deegan* [1980] 49 C.C.C. (2d) 417 and *R v Crothers* [1979] 43 C.C.C. (2d) 27 where the doctrine was approved.

the qualified defence and its acceptance in the Canadian Courts. Nevertheless, no formal approval was accorded to it in the discussion. The court dealt with this question on the basis that there was such a doctrine. They observed that "charges on self-defence in a case of this kind are always very difficult" but concluded that while some passages in the charge of the trial judge tended to be confusing, the charge read as a whole was correct on the issue of self-defence.

In Saskatchewan, the doctrine has met with a similar reception. The leading case decided in the Saskatchewan Court of Appeal, as far as the middle path rule is concern, is in the case of *Regina v. Crothers*.[27]

In this case, the accused shot dead a woman in his farm house. The woman and her husband had gone to the accused's dwelling for the purpose of obtaining marijuana which the accused was said to have been keeping there. They failed to get the marijuana even though a thorough search was said to have been made. This greatly upset both the deceased and her husband. They began to behave violently and as a result of some altercation the accused shot the deceased and fatally wounded her. The accused also fired towards the deceased's husband but did not kill him.

In the trial court, the accused was charged on indictment with first degree murder. He was acquitted of that charge but was found guilty of manslaughter, on the grounds of excessive force in self-defence. This was the main reason for the appeal by the Crown. It was submitted in the Court of Appeal that the trial judge was wrong in directing the jury on the point of excessive self-defence. The trial judge said:

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27 [1979] 43 C.C.C. (2d) 27. This case was decided on the 18th of July 1978 in the Saskatchewan Court of Appeal.

"If you conclude on the balance of probabilities not beyond a reasonable doubt, if you think that it is more likely than not the accused acted in self defence or in the defence of his home, but that the Crown has shown you beyond a reasonable doubt that he used too much force you convict of manslaughter. It becomes the same rule as provocation really. This is another example of the law permitting a crime which is culpable homicide to be reduced to the lesser of the two crimes, that is, manslaughter."[28]

On appeal, the Crown referred to the Privy Council decision of *Palmer v. The Queen,*[29] stressing its rejection of the doctrine of excessive force in self-defence, and on the English Criminal Court of Appeal case of *McInnes v. The Queen*[30] which followed the decision in *Palmer*.[31] The Crown submitted that the judgements in those two cases, precisely their rejection to the middle path rule, should be followed.

The Court of Appeal, nevertheless, was not persuaded by this argument. Those two cases were held to be *'not in accord with the law of Canada'*. The law applicable, as affirmed by the Appellate Court, is that set forth in the case of *R. v. Stanley.* [32]

The Court of Appeal then quoted with approval the judgement of Branca J.A. when he asserted:

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28 *Ibid.*, at p. 28.

29 (1971) 55 Cr.App.R. 223.

30 (1971) 55 Cr. App. R. 551.

31 *Supra*, fn. 29.

32 *Supra*, fn. 22 at p. 216.

". . . .If the force used was excessive or if the death was caused in circumstances not coming within s. 34 (2) and if there was not intent within s. 42 of the Criminal Code then the death was caused by an unlawful act but not in circumstances amounting to murder. . . . . .Accordingly, the new trial should not be on a charge of murder, but rather on manslaughter only."[33]

The significance of this case is not only that the middle path rule was endorsed but also that, it is perhaps one of the very few cases where the Privy Council decision in *Palmer v. R.*[34] and the judgement of English Court of Appeal in *McInnes*[35] were rejected. The judgement that a verdict of manslaughter should be returned in a case where the accused's defensive act was more than what would be required derived its authority from the previously decided cases, namely the cases of *R. v. Stanley*[36] and *R. v. Barilla.*[37] The court also accepted the view that an accused who committed homicide in such pressing circumstances is criminally less culpable than a cold blooded killer. These arguments were to the Appellate Court highly persuasive, rendering the need to consider whatever arguments had been adduced in the two cases decided by the Privy Council and the English Court of Appeal as of no significance.

The position of the middle path rule was discussed in the Alberta Court of Appeal in the case of *Regina. v. Deegan.*[38] There was evidence to show that the

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33 *R. v. Crothers*, *supra*, fn. 27 at p. 30.

34 *Supra*, fn. 29.

35 *Supra*, fn. 30.

36 *Supra*, fn. 22.

37 *Supra*, fn. 16.

38 [1980] 49 C.C.C.(2d) 417. This case was decided on the 20th of July 1979 in the Alberta Court of Appeal.

accused had struck the deceased before the killing. The deceased went after the accused, attempted to force a door open and nearly broke it down. The deceased got into the house and became involved in a fight where he met his death. The accused pleaded self-defence, defence of property and provocation. The trial judge did not instruct the jury that it was open to them to bring in a verdict of guilty of manslaughter, in considering the defence of self-defence where the accused used more force than a reasonable man in the same circumstances would consider necessary. The result of this direction was that the accused was convicted of murder. The accused appealed.

Prowse J.A. concentrated on the point of intention to commit culpable homicide. He stated that it is incumbent upon the trial judge to consider the intent of the accused in committing the act of killing and to direct the jury accordingly. From his judgement, it is abundantly clear that there is a need to differentiate between intention to kill as stated in section 212 (now 229) and a case where the accused had the intention to kill in exercising his right of self-defence in section 34 (1) and (2). In his separate judgement, he concluded by saying:

"If the accused's mind was consumed with an apprehension of death or grievous bodily harm, his act thereafter "being the purely physical product of" such passion, can it be said that he formulated the requisite specific intent for murder? In my view, in such circumstances he could not be said to have formed a genuine intent of the nature required to support such a conviction."[39]

He explained the view that the trial judge had not given careful attention to this particular issue, and this, he ruled, was a misdirection. Had the issue been

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39 *Ibid.*, at p.424.

considered a manslaughter verdict would have been the only reasonable solution. In the final stage of his judgement, the appropriate direction for excessive defence was formulated in these terms:

"If you find that the accused's actions were dictated by a fear of death or grievous bodily harm, or if you are left with a reasonable doubt on that point, then you should bring in a verdict of manslaughter although you found he used excessive force."[40]

The significance of this case is that the Court of Appeal emphatically upheld the need for the trial court to give instructions to the jury in accordance with the middle path rule. The failure of the trial court to do so was held to be substantially erroneous. The judgements in *R. v. Barilla*,[41] *R. v. Ouellette*[42] *and R. v. Stanley*[43] were quoted with approval. Here the moral culpability argument is the main justification for the middle path rule.

In a more recent case, *R. v. Fraser*,[44] the Alberta Court of Appeal approved the doctrine of excessive self-defence. In this case the accused had been sexually attacked by the deceased in his house. He initially invited the deceased for a drink but later became involved in a fight. The accused beat the deceased with a walking stick causing severe injury which resulted in death.

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40 *Ibid.*

41 *Supra*, fn. 16.

42 *Supra*, fn. 18.

43 *Supra*, fn. 22.

44 19 C.R. (2d) 193. This case was decided on the 21st of November 1980 in the Alberta Court of Appeal.

The Crown's theory in the trial court was that the accused attempted to rob the deceased and that he ran into some difficulty and assaulted the deceased in order to achieve this criminal purpose. This theory was rejected by the trial judge. The trial court concluded that there was sufficient evidence to show that the accused was sexually attacked and the trial judge was also satisfied with the fact that the accused had justifiably been exercising his defensive act to repel the unlawful attack against him by the deceased. Having said that, however, it was the opinion of the trial court that the accused had been excessive in his defence and that he knew that the amount of force used in his defence was more than necessary. On these grounds, the accused was convicted of manslaughter.

When the matter was brought before the Court of Appeal, the trial judge's findings were not upheld. The Appellate Court decided that in every case of self-defence, the court has to consider the six propositions laid down in the Australian case of *Viro v. The Queen*.[45] Particular reference was made to paras 5 and 6 of the formulations where it is suggested that where the jury is satisfied that the accused employed more force than necessary, he must have the belief that the force used is reasonably proportionate to the danger he is facing. If he did not have such a belief, the verdict should be murder. If he has that belief, however, it is open to the court to convict him of manslaughter. The formulations stressed the importance of the belief of the accused at the time of resisting the attack that it has to be reasonably proportionate to the danger he faces. If the jury is satisfied that he has that belief, he should be convicted of manslaughter, otherwise, he should be convicted of murder.

Now, by adopting the propositions formulated in *Viro v. The Queen*, it is required that in a situation where the accused believes that the amount of force used is not "reasonably proportionate" (which means he knows that it was excessive) at

45 (1978) 141 C.L.R. 88, (1978) 52 A.L.J.R. 416.

the time of exercising his defensive act, this will require him to be convicted of murder.

The trial court, however, in the course of its judgement assumed that the accused knew the fact that his act was indeed excessive.[46] At this point, the Appellate Court decided that the trial court's direction was substantially erroneous. If this direction were to be accepted, by virtue of directive 5 and 6 of *Viro's* formulation which the Appellate Court adopted, the accused could never have been convicted of manslaughter but would have to be convicted of murder.

Moir J.A.'s judgement deals quite extensively with the doctrine of excessive force in self-defence. He describes the doctrine in Canada as "in a very unsatisfactory state".[47] Having said that, however, the judge in his majority judgement refers to the decision of Supreme Court of Canada in *Linney v. The Queen*.[48] The decision in that case, though not expressly approving the principle of middle-path rule, did not disapprove it. This, according to the Court of Appeal, allows for the application of the doctrine.

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46 In the course of the judgement the Court of Appeal quoted the trial court's decision:
"However the accused did know what he was doing at the time, and I refer here to the fact that he knew that he was hitting the deceased and he knew he was inflicting harm upon Bjornson.
"It does sound to me to be reasonable and logical, as was postulated by detective Barrow, that the accused found himself in a situation where he felt things had gotten out of hand and was striking out to defend what he thought was a difficult position for himself.
"In my view, I accept the case which suggest that, in a situation where elements of provocation and self-defence exist, the use of excessive force does not constitute murder but constitutes manslaughter.
"I therefore come to the conclusion that, under the peculiar facts of this case and under the evidence, interpreted as best as I can, the accused is not guilty of murder but is guilty of manslaughter." *R. v. Fraser*, *supra*, fn. 44 at p. 214.

47 In his judgement he said that the acceptance of the doctrine was inconsistent in the Canadian Courts. Decisions of various Courts of Appeal go in both directions and, indeed, may be inconsistent within the same court. *Ibid.*, at p. 218.

48 [1978] 73 D.L.R. (3d) 4.

The judge also makes reference to the cases of *R. v. Howe*[49] and *R. v. McKay,*[50] the two Australian cases where the doctrine was said to have originated. The court in its conclusion accepted with approval the six propositions enunciated by Mr. Justice Mason in *Viro v. The Queen.*[51] In addition to the six propositions, which are now laid down as requirements for trial judges in dealing with self-defence case, the Appellate Court also laid down three conditions for the defence of excessive self-defence;

1. Certain serious circumstances must exist which led the accused to reasonably believe that a situation involving danger existed.

2. The accused used unreasonable or excessive force.

3. The accused was acting honestly when he used excessive force, in that he mistakenly believed that the degree of force he was using was reasonable.

Like Mason C.J. in *Viro v. The Queen*, Moir J.A. also justified his acceptance of the doctrine by reference to the moral culpability argument. Moir J.A. thus stated:

". . . . . the defence of self-defence, which fails because of excessive force, operates so as to excuse the intent to kill or injure where the surrounding circumstances are such as to reduce the moral culpability of the accused, as it does in provocation, and may make the crime manslaughter, not murder."[52]

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49 (1958) 100 C.L.R. 448.

50 [1957] V.R. 560.

51 *Supra*, fn. 45.

52 *R. v. Fraser*, *supra*, fn. 44 at p. 220.

Of all the explanations provided in the Canadian cases, the matter of utmost importance is the acceptance of the excessive defence defence in the Alberta Court of Appeal. With the acceptance of the six propositions set forth in *Viro v. The Queen*,[53] the approval of the moral culpability argument, the implicit rejection of the case of *Palmer v. R.*,[54] and the three conditions that have now been formulated, the doctrine was now, following this case, set to be the law in the Alberta Court of Appeal.[55]

In the Province of Ontario, a similar discussion of the application of the doctrine has taken place in its Criminal Court of Appeal. In the case of *R. v. Hay*[56] one of the grounds of appeal submitted by counsel for the appellant was that the accused was entitled to rely on the defence of excessive defence. The facts were that the accused, in protecting his common law wife against an attack from the deceased, fired several shots at him. The first shot was discharged at the time when the deceased was approaching within arm's length of the appellant's wife. This shot apparently had stopped the deceased from carrying out his intention to attack the appellant's wife. He stopped and fell to the ground. However, when the appellant was leaving the locus, the deceased tried to seize him by the foot; the appellant fired two more shots, causing the deceased's immediate death.

The appellant counsel's submission of excessive defence was rejected. However, it is to be stressed here that no attempt was made by the court to clarify

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53 *Supra*, fn. 45.

54 *Supra*, fn. 29.

55 The approval of the six propositions laid down by Mason C.J. in *Viro v. The Queen* was significant. The propositions had now been overruled by the case of *Fadil Zecevic*, (1986-1987) 25 A.Crim.R. 163, in the High Court of Australia. In was not clear whether this decision affected Moir J.'s judgement. However, since the doctrine itself was disapproved in the Canadian Supreme Court, the need to elaborate on the controversial propositions seems unnecessary.

56 22 C.R.N.S 191 (Ont.C.A.). This case was decided on the 16th of April 1973 in the Ontario Court of Appeal.

the doctrine of excessive force in self-defence. This was apparently because the Appellate Court had come to the conclusion that the nature of the accused's repelling force did not qualify him for even the defence of self-defence.

Similarly in the case of *R. v. Balasiuk*,[57] the Ontario Court of Appeal did not make any meaningful contribution to discussion of the doctrine. This is probably due to the fact that the appellate court in its judgement did not believe that there was evidence upon which it could be found that the force used by the accused was more than was necessary to enable him to defend himself. [58] Hence, even though excessive defence was in issue, no significant discussion appears in the judgement in this case.

The Ontario Court of Appeal was once again confronted with the same issue in the case of *Regina v. Trecroce*.[59] Having dealt with the issue very briefly in the previous cases, this time the doctrine of excessive force was discussed at considerable length. Counsel for the appellant in this case urged as a ground of appeal that the trial judge had erred in failing to instruct the jury that excessive self-defence leads to a conviction for manslaughter. It was held that the accused had no substantial ground on which to plead the defence of excessive self-defence since his main defence was, in actual fact, not excessive defence but rather that the shots which caused the death of his wife were discharged accidentally. However the court still found it appropriate to elaborate on the doctrine because of its importance for future cases.

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57 28 C.R.N.S 263 (Ont. C.A). This case was decided on the 17th of January 1975 in the Ontario Court of appeal..

58 *Ibid.*, at p. 264.

59 [1981] 55 C.C.C. (2d) 200. This case was decided on the 29th of September 1980 in the Ontario Court of Appeal.

The court recognised that the doctrine had been the subject of considerable discussion in Canadian courts. As appears from the judgement, the Appellate Court itself was not prepared openly to declare the availability of the doctrine, even while acknowledging the approval of the qualified defence by some provincial courts.[60]

Martin J.A., in delivering the courts judgement, was cautious in his discussion of the defence but nevertheless expressed the court's willingness to accept it as a substantive doctrine if a genuine case of that kind were to come before the court for its determination.[61] This is shown by the fact that he laid down three requirements for the defence:

1. The accused must have been justified in using some force to defend himself against an attack, real or reasonably apprehended.

2. The accused must have honestly believed that he was justified in using the force that he did.

3. The force used was excessive only because it exceeded what the accused could reasonably have considered necessary.

In this case the court did not formally pronounce on the validity of the doctrine. However, at the same time it did not indicate any disagreement with the essence of the qualified defence. One might conclude, then, that if a genuine case

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60 The court referred to the case of *R. v. Barilla, supra*, fn. 16, *R. v. Ouellette, supra*, fn. 18 and *R. v. Crothers, supra*, fn. 27.

61 It has to be noted that even though the qualified defence was thoroughly discussed, the facts of the case itself did not really relate to the doctrine. The court repeatedly stressed that the accused's defence was not that he shot the deceased three times in self-defence honestly believing that he was justified in doing so but, rather, that the gun discharged accidentally in a struggle with the deceased for possession of the gun.

arose which necessitated the court's taking account of the doctrine, there is a strong possibility that it would be applied.

Two years after *Trecroce*[62] was decided, the Ontario Court of Appeal was once again faced with the question of the validity of the qualified defence. In *R. v. Reilly*[63] the point faced by the Appellate Court was whether the trial judge erred in not giving directions on the qualified defence to the jury. It was unanimously held that there was no substantial error on the part of the trial judge in not directing the jury on the defence of excessive defence.

However, the significance of this case lies in the clear approval accorded by Arnup J.A. to the qualified defence. As the judge said:

"In the light of the decisions of the Courts of Appeal of British Columbia, Alberta, and Saskatchewan, and upon considering of the careful review of the subject by Martin J.A. in *Campbell, supra*, and *Trecroce, supra*, I have reached the conclusion that the doctrine of excessive force in self-defence rendering the accused guilty only of manslaughter instead of murder should be recognised in Ontario."[64]

Arnup J.A. also accepted the three prerequisites of excessive defence laid down by Martin J. in *R. v. Trecroce*.[65] The court went on to find that the appellant had not honestly believed that he was justified in using such amount of force (the first test) and also that the force used was greatly in excess of what the appellant

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62 *Supra*, fn. 59.

63 [1982] 66 C.C.C.(2d)146. This case was decided on the 9th of March 1982 in the Ontario Court of Appeal.

64 *Ibid.*, at p. 160.

65 *Supra*, fn. 59.

could have considered reasonable (the second test). And it is on this basis that the appeal was dismissed.

3.3 EXCESSIVE SELF-DEFENCE IN THE CANADIAN SUPREME COURT

3.3.1 The case of *Brisson v. The Queen*[66]

The doctrine of excessive self-defence was discussed quite extensively by the Supreme Court of Canada in the case of *Brisson v. The Queen.*[67] The accused in his statement to the police said that on the day of the killing, he picked up a tramp (the deceased) with whom he later had dinner, and then drove around with him. The accused was seated in the back of the automobile and had been drinking consistently. They had a disagreement and started to quarrel. The deceased was said to have struck the accused with a half-full bottle but did not cause him any serious injury. The accused tried to calm him down but was not successful. He then pushed the deceased into a corner, stretched his arm over the back seat, took a bottle and hit the deceased on the head. It was proved that the deceased met his death as a result of the severe injury sustained from the blow.

The accused was found guilty of murder in the trial court. His appeal in the Quebec Court of Appeal was based inter alia, on the argument that the trial judge had erred in not leaving to the jury the qualified defence of use of excessive force in self-defence so as to reduce the charge of murder to manslaughter. The Quebec Court of Appeal turned down this argument. It was on the basis of the same submission that he then brought the matter to the Canadian Supreme Court.

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66 139 D.L.R. (3d) 685. This case was decided on the 9th of August 1982 in the Canadian Supreme Court.

67 *Ibid.*

In the Supreme Court, Dickson C.J. reviewed in great detail the position of the doctrine and its application in the common law and code jurisdictions. First of all he referred to a series of decided cases in Canadian provincial courts which dealt with the same question. The case of *R. v. Barilla*[68] was first cited. He commented that this was the main case on which later decisions were based in their search for authority on excessive defence.[69]

After acknowledging the importance of *R. v. Barilla*, the judge then cited the cases of *R. v. Ouelllette*,[70] *R. v. Basabaras and Spek*,[71] *R. v. Stanley*[72] where judgements were delivered approving the application of the defence as set forth in *R. v. Barilla.*

The court discussed also the case of *R v. Fraser*[73] where Moir J. made some useful observations on the issue. Moir J. as well as many other judges and lawyers in favour of the doctrine, based their approval predominantly on moral culpability arguments. However, Dickson J. had his own opinion on this point. He shared the same view as others in appreciating the need to find a middle path rule to deal with the case of a person who in defending his life, used more force than was necessary. However he also believed that there would be a need for Parliamentary approval[74]of such a fundamental change in the law.

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68 *Supra*, fn. 16.

69 The decision at the same time noting the fact that in *R. v. Barilla*, *ibid.*, the middle path rule was taken from English authorities.

70 *Supra*, fn. 18.

71 *Supra*, fn. 25.

72 *Supra*, fn. 22.

73 Supra, fn. 44.

74 *Brisson v. The Queen*, *supra*, fn. 66 at p. 696. Dickson J. explained that Parliament had approved the verdict of manslaughter in a case involving an element of provocation. For this

In its acceptance of the doctrine, the court in *R. v. Fraser*[75] went on to adopt the six propositions set out by Mason C.J. in *Viro v. The Queen.*[76] On this issue, Dickson J. was as sceptical as were other judges as to the practicability of the test; whether or not it could be translated into practice with the necessary smoothness.[77] On this issue the judge expressed the view: "If the law of Canada is as above and judges must henceforth give juries instructions on the issue of manslaughter arising from excessive use of force in self-defence along the lines of those set forth by Mason J. in *Viro v. The Queen*, I cannot but think that the task of the jury, presently difficult enough in a murder case, will be vastly more so."[78]

Dickson J., then proceeded to make reference to other provincial decisions relating to the same issue. The decisions of Ontario Court of Appeal in the cases of *R. v. Hay*[79] and *R v. Trecroce*[80] were highlighted. It is implicit from his commentary on those decisions that he acknowledged the fact that none of those cases disapproved the basic principle of the doctrine.

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matter, s.215 of the Canadian Criminal Code had therefore dealt with the issue of provocation. The guidelines and conditions of the defence were hence articulated. From this judgement, one might infer that in the opinion of the court, if the qualified defence of excessive defence is to be applied the same standing must be set out. This would mean a clear set of provisions explaining the application of the qualified defence must be made in the Criminal Code. In the absence of this parliamentary approval, the qualified defence could not be said to be part of Canadian criminal law.

75 *Supra*, fn. 44.

76 *Supra*, fn. 45.

77 It is to be noted here that this prediction was made before it was formally recognised in the High Court of Australian case of *Fadil Zecevic*. [1986-1987] 25 A. Crim. R. 163. The six propositions of Mason C.J. could be said to have greatly contributed to the demise of the doctrine of excessive self-defence in Australia.

78 *Brisson v. The Queen, supra*, fn. 66 at p. 697.

79 *Supra*, fn. 56.

80 *Supra*, fn. 59.

The judgement of *R. v. Reilly*,[81] where Arnup J.A. had openly approved the doctrine, was discussed, but the Supreme Court was not entirely convinced by the reasoning behind the Ontario Appeal Court's recognition of the qualified defence. The court's criticism was primarily directed towards the question of the argument of the real need for the existence of the doctrine itself. The Supreme Court was of the opinion that what was lacking in the Appeal Court's decision was any acceptable explanation of why the use of excessive force should reduce murder to manslaughter.[82] It appears, then, that the moral culpability argument, so often regarded as a justification in support of the defence, was not acceptable or perhaps was not strong enough to validate the middle path rule.

Another criticism made of the Appeal Court's judgement is that no reference was made to the Criminal Code in the discussion of excessive defence. Dickson J. did not elaborate on this point, but it could be assumed that this would mean, in the opinion of the Supreme Court, that no provisions in the Canadian Criminal Code provide any justification for the introduction of the qualified defence, and that not referring to the Criminal Code amounted to a substantial error. Therefore, even though the doctrine was accepted in the Appeal Court, the reasons for the acceptance did not entirely satisfy the Supreme Court in the present case.

The unanimous decision of the Manitoba Court of Appeal in *R. v. Appleby*[83] is significant in the sense that it was the only Court of Appeal in Canada which has

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81 *Supra*, fn. 63.

82 Dickson J. in commenting the judgement of Arnup J. in *R. v. Reilly, ibid.*, said: "The judgement does not say why the use of excessive force in self-defence should reduce murder to manslaughter, nor is there reference to the Criminal Code." This statement shows that in the opinion of the Canadian Supreme Court, any attempt to introduce the doctrine needs to be laid down clearly in the Criminal Code as the main source of Canadian Criminal Law. *Brisson v. The Queen*, *supra*, fn. 66 at p. 699.

83 [1979] 1 W.W.R. 664.

rejected the doctrine. The Appeal Court decided that the law applicable in Canada is similar to that applicable in England. The court accordingly decided that the decision of *Palmer v. R.*.[84] correctly stated the law of self-defence. However, despite the fact that reference was made to this case, there is no evidence to suggest that the Supreme Court was overwhelmingly influenced by this conclusion in its rejection of the doctrine in the present case.

Finally the Supreme Court ended its review on the availability of the doctrine in Canada by referring to its own decision in *Linney v. The Queen.*[85] In his commentary on this case, Dickson J. maintained that the only question in *Linney* was whether the trial judge erred in failing to instruct the jury that if they were in doubt as to whether the act of killing was provoked it was their duty to reduce the offence from murder to manslaughter. Therefore, excessive force in self-defence was not essentially the main issue in the Supreme Court's judgement in that case. Accordingly any attempt to say that that case implied the Supreme Court's acceptance of the qualified defence was incorrect.[86]

After this extensive review, the court summed up by saying: "A review of the Canadian authorities shows a singular lack of uniformity in result and in reasoning. It is difficult to say that the cases follow any pattern, or the law of any country, or that, to date, any clear statement of principle has emerged."[87] This was concluded after taking note that the majority of the Provincial Courts of Appeal had decided not to reject the doctrine or not to comment on this issue.

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84 *Supra*, fn. 29.

85 *Supra*, fn. 48.

86 In *R. v. Fraser*, *supra*, fn. 44, the Alberta Court of Appeal had by contrast decided that in the absence of a clear disapproval of the qualified defence, the Supreme Court's decision in *Linney* case provides justification for its acceptance.

87 *Brisson v. The Queen*, *supra*, fn. 66 at p. 700.

3.3.2 Commentary

It is apparent from the judgement that the line of favourable decisions in the Canadian provincial courts did not necessarily provide a convincing reason to persuade the Supreme Court to apply the doctrine and formally pronounce its validity in Canadian Criminal Law. The lack of uniformity and consistency among the Canadian courts in the application of the doctrine only strengthened the Supreme Court's conviction against it. The primary reason, however, for the Supreme Court's hesitation in adopting the doctrine was the Criminal Code itself. It was pointed out that sections 25 to 45 of the Criminal Code sufficiently covered the occasions on which the use of force was legally justified. The introduction of the doctrine would substantially contradict the provisions of the Code, especially sections 25 to 45.[88] Finally, section 34 of the Code, which specifically deals with the defence of self-defence, does not provide any room for the doctrine.

In summary, the Supreme Court's judgement in this case was not in line with many Provincial Court decisions, with the exception of the judgement of Manitoba Court of Appeal in *R. v. Appleby*.[89] The rationalisations of the doctrine in the Provincial Appellate Courts were not sufficiently cogent to justify its formal recognition. The decision was therefore a serious blow to the proponents of the qualified defence; instead of waiting for formal recognition, it has now been rejected in the highest court in the country.

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88 The Supreme Court came to this conclusion after quoting the Tasmanian case of *Masnec v. The Queen* [1962] Tas. S.R. 254, where it was said that Sections 46 and 47 of the Tasmanian Criminal Code covered comprehensively the occasions on which the use of force was legally justified. The Supreme Court thus said that Sections 25 to 45 of the Canadian Criminal Code equally cover comprehensively and authoritatively the occasions on which the use of force is legally justified. There would seem little room for competing or supplementary common law doctrine. *Ibid.*, at p. 702.

89 *Supra*, fn. 83.

3.3.3 The case of *Reilly v. The Queen*[90]

When this case came before the Ontario Criminal Court of Appeal, it was decided by Arnup J. that the doctrine of excessive force in self-defence was plausible in its essence and formal approval of it was accordingly made.[91] However, when it progressed to the Supreme Court of Canada, the qualified defence received a different reception altogether. The Supreme Court, even though recognising the weight of Arnup J.'s judgement, rejected the doctrine after detailed analysis. The main reason for this was that the court felt bound by its previous decision in the case of *R. v. Faid*[92] where, in the unanimous judgement delivered by Mr. Justice Dickson, the doctrine was rejected.

3.3.4 The case of *R. v. Gee*[93]

The question of the validity of the doctrine of excessive force in self-defence underwent an interesting development in the case of *R. v. Gee*. The facts of the case were that on the day of the killing, the two accused persons, a male and female prostitute, with one of their friends were at the deceased's home. They had a drink together a short time before the killing. The accused/respondents claimed that while

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90 [1985] 13 D.L.R.(4th)161. This case was decided on the first November 1984 in the Supreme Court of Canada.

91 The Court of Appeal stated:
"In the light of the decisions of the Courts of appeal British Columbia, Alberta, and Saskatchewan, and upon consideration of the careful review of the subject by Martin J.A. in *Campbell*, *supra*, and *Trecrose*, *supra*, I have reached the conclusion that the doctrine of excessive force in self-defence rendering the accused guilty only of manslaughter instead of murder should be recognised." *Regina v. Reilly*, 66 C.C.C. (2d)146 at p. 160.

92 145 D.L.R. (3d) 67. This case will be discussed at p. 116 below.

93 *Supra*, fn. 15. This case was decided on the 9th of August 1982 in the Canadian Supreme Court.

they were in the dressing room a fight broke between the deceased and their friend. In an attempt to stop the deceased, they then hit the deceased several times on the head. These blows proved to be fatal. At the trial court they were convicted of second degree murder.

McDermit J. in delivering his judgement in the Alberta Court of Appeal, accepted that the law in Canada was the same as the law in Australia and that the honest although mistaken belief that no more force is being used than is necessary is a defence that reduces what would otherwise be murder to manslaughter.[94] This amounted to ruling that the Australian doctrine of excessive force in self-defence is recognised and applicable in Canadian courts. The decision was based on the argument that section 7 (3) (now 8 (3)) of the Canadian Criminal Code provides room for the introduction of the doctrine in Canada.[95] The justification for the reduction of murder to manslaughter was found in the moral culpability argument; that a person who uses more force than is necessary but not more than he honestly but mistakenly believes is necessary to prevent the commission of a violent crime, is less culpable than a cold blooded murderer.

The doctrine received an entirely different reception when the case was brought to Supreme Court of Canada. The validity of the doctrine as accepted in Alberta Court of Appeal was, not surprisingly, the primary issue for the court's determination. It was concluded that the doctrine could not be accepted under the Canadian Criminal Code. The judge referred to the judgement of *R. v. Brisson*,[96] where the doctrine was rejected, and the same arguments were reasserted.

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94 *Ibid.*, at p. 596.

95 The full citation of this provision was quoted at p. 85 - 86 in this chapter.

96 *Supra*, fn. 66.

The main reason for the rejection was simply that the Canadian Criminal Code is self-sufficient. In other words the argument underlying the rejection of the doctrine was based on the fact that the doctrine itself could not fit any of the provisions in the Code. Whether an offence is murder or manslaughter had already clearly been explained. The Supreme Court went on to explain that Section 205 of the code is a clear provision regarding the category of homicide. The provision stated that homicide is either non-culpable, in which case it is not an offence and completely justifiable, or culpable. Culpable homicide thus is murder or manslaughter or infanticide.

Section 212 (now 229) further explains that culpable homicide is murder when the person who causes the death of a human being means to cause death or means to cause bodily harm, or knows that he will cause bodily harm and is reckless whether death ensues or not. In the absence of that intent or of recklessness, culpable homicide is manslaughter or infanticide.

Now, returning to the case under discussion, it is to be noted that the argument put forward by the respondents (accused) was that the killing was done in an attempt to prevent the commission of a crime.[97] In this regard therefore, the relevant provision available in the Criminal Code is section 27, which reads:

> "Every one is justified in using as much force as is reasonably necessary
>
> (a) to prevent the commission of an offence

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97 The main defence claimed by the accused was actually one of the prevention of the commission of an offence. The gist of the respondent's argument was that, should the qualified defence of excessive force in self-defence exist in Canada, then, by analogy, the qualified defence of excessive force in the prevention of an offence should also be admitted. Obviously in deciding the authoritativeness of this claim discussion has to be made regarding the position of the defence of excessive defence in Canada.

i) for which, if it were committed, the person who committed it might be arrested without warrant, and

ii) that would be likely to cause immediate and serious injury to the person or property of anyone; or

(b) to prevent anything being done that, on reasonable or probable ground he believes would, if it were done, be an offence mentioned in paragraph (a)."

This provision, if successfully pleaded would entitle the accused to a complete acquittal. Where it is rejected, the crime committed is one of murder, if the accused has the required intent. In the absence of that intent, it would be manslaughter, not because of partial justification under section 27, but because the special mental element required for guilt of murder has not been proven.

Based on these arguments, the Supreme Court finally concluded that, the defence of excessive defence as in Australia could not be applied in Canadian courts. The Canadian Criminal Code has no room for the qualified defence. Section 27 of the Code has therefore provided no space for the introduction of the half-way house principle.

3.3.5 Commentary

The Supreme Court had again rejected the middle path principle, while simultaneously rejecting arguments in support of it. The reason behind the rejection was predominantly based on the fact that the Canadian Criminal Code provides no

room for the adoption of the doctrine. In the course of the reasons for judgement, however, the judge made special reference only to the case of *Brisson v The Queen* and the reasoning elaborated in that case was found to be so compelling to follow.

3.3.6 The case of *R. v. Faid*[98]

The facts of the case were that the accused had a fight with the deceased in the trailer which they were sharing, before the deceased was stabbed to death. The accused admitted to having had a quarrel with the deceased and testified that he was about to leave when the deceased stopped him. In the ensuing struggle the deceased produced a knife but the accused managed to obtain this weapon after hitting the deceased with a wrench. The accused then again tried to leave when, according to his statement in the court, he saw the deceased heading for a loaded spear gun. At that time, he thought that his life was in serious danger and accordingly stabbed the deceased three times in the back.

He was convicted of second degree murder in the trial court. In the Alberta Court of Appeal, the murder conviction was quashed on the basis that the trial judge had failed to direct the jury on the defence of excessive force in self-defence and also failed to leave the defence of provocation. A new trial was hence ordered on the charge of second degree murder. The Crown appealed in order to test the validity of the Appeal Court's decision in the Canadian Supreme Court. Among the issues argued was that the judgement in favour of excessive defence defence was erroneous and could not be justified under the Canadian Criminal Code.

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98 *Supra*, fn. 92. This case was decided on the first of March 1983.

In the Supreme Court, the Crown's appeal was allowed and the trial court murder conviction was reinstated. Thus, the Alberta Court of Appeal's recognition of the qualified defence was once again reversed by the Supreme Court's judgement.

3.3.7 Reasons for the Supreme Court's rejection of the doctrine

The Supreme Court, through the judgement of Dickson J., firmly stressed the inapplicability of the qualified defence in Canada. The judgement implicitly demonstrated the court's strong conviction that the Canadian Criminal Code has sufficiently dealt with murder charges. Even though mention was made of the Court of Appeal's references to cases stressing the importance of trial judges giving a direction relating to the qualified defence, this did not necessarily demonstrate that it had been part of the Canadian criminal law.

The leading case referred to was that of *Brisson v. The Queen*,[99] and it is clear that Dickson J.'s judgement amounted to a repetition of the majority judgement delivered by himself in *Brisson v. The Queen.*

As a result of the judgement in this case, the Canadian Supreme Court's approach towards the charge of murder could be explained thus: in a case where the accused is proved to have acted in self-defence, satisfying section 34 of the Criminal Code, he is entitled to a complete acquittal. Where the jury is not satisfied that he could rely on this section as a defence - perhaps on the basis of the excessive force used in the course of his defence - it does not automatically mean that a murder conviction is the only verdict left for the court. The jury now has to satisfy itself that he has the requisite intent, as laid down in section 229 (formerly 212 (a)) of the

99 *Supra*, fn. 66.

Code, to commit murder. If the jury is not convinced that he had that intention, then he will be held guilty of manslaughter. The central point here is that the reason for a manslaughter verdict is not because there exists the qualified defence of excessive defence, but rather because the Code itself provides the alternative of manslaughter in section 212 (a) by virtue of lack of the necessary intent for murder and perhaps, if successfully pleaded, the defence of provocation under section 215.

This judgement again crystallises the Supreme Court's conviction that the Canadian Criminal Code is in itself complete in dealing with murder charges and therefore the need to introduce the qualified defence should not arise.

3.3.8 Excessive force in self-defence in the case of *Bayard v. R.*.[100]

This is a case where in a fight the accused stabbed the deceased thirteen times with a pocket knife. The deceased met his death as a result of the serious injury suffered from the stabbing. The accused admitted the stabbing, but pleaded self-defence. In the course of the trial, the judge directed the jury that if they concluded that the accused used more force than was necessary, their verdict would be manslaughter. The accused was consequently acquitted of the charge of second degree murder and manslaughter. The Crown appealed and the main ground of appeal was that the trial judge had erred in directing the jury on excessive defence.

The majority of the British Columbia Court of Appeal allowed the appeal and ordered a new trial. On the issue of excessive defence, Carrothers J.A. held that the trial judge should have instructed the jury that a finding of excessive force should

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100 (1989) 70 C.R. (3d) 95. This case was decided on the 22nd of March 1989 in the Supreme Court of Canada.

lead to a verdict of murder rather than manslaughter, subject only to a finding that the accused lacked one of the two intents for murder. It is thus apparent from the majority judgement that the use of excessive force in self-defence could not reduce what would otherwise be murder to manslaughter.

The judgement was strongly dissented from by Lambert J.A. and his dissenting judgement was upheld in the Supreme Court. Lambert J.A. held that there had been no misdirection on the part of the trial judge and the jury's verdict of acquittal should be restored.

This judgement was based on the argument that where the use of force is excessive, in applying section 34 (1), a manslaughter verdict could properly be upheld.[101] Section 34 (1) provides that someone is justified in repelling an unprovoked attack, if the force used did not intend to cause death or grievous bodily harm. In the event where one has the intention to cause death or grievous bodily harm, (as stated in section 229 (a)), this subsection could not be used as a defence. However, where the accused had no intention to cause death or grievous bodily harm, but used an amount of force greater than was necessary, the verdict could be one of manslaughter. Therefore, on this basis, the trial judge's instruction to the jury on the possible verdict of manslaughter in a case where the use of force was excessive did not lead to any substantial injustice in the final outcome of the trial.

This dissenting judgement of Lambert J.A., together with the reasoning he employed, were fully ratified and adopted in the Canadian Supreme Court through Wilson J. in delivering the court's judgement. The main question that arises from the Supreme Court's judgement in this case is whether this judgement means that the

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101 In this case it was accepted that the jury were considering section 34(1) in reaching their conclusion.

defence of excessive force has now been accepted in the Supreme Court after it was previously, on many occasions, rejected? To answer this question it is necessary to look at the main issue intended to be decided by the court. The main point for the Supreme Court's determination was not to decide on the validity of the doctrine or its application in the Canadian court. The case was rather confined specifically to the interpretation of section 34 (1) of the Criminal Code. That particular section was, as Lambert J. explained in his dissenting judgement, capable of allowing a person to be convicted only of manslaughter where in his defence to an unlawful and unprovoked attack, he had not intended to cause death or grievous bodily harm but judged objectively, had exceeded the force that would actually have been required at that particular moment. And the main reason for allowing manslaughter instead of murder in this instance is because from the very beginning the accused had no intention to cause death or bodily injury.

This case did not deal with the situation where an accused, while intending to cause death or serious bodily harm, used excessive force in his act of defence, but honestly (albeit unreasonably) believed that the force used was necessary. In the light of previous authority, it seems that excessive defence has no application in Canadian Criminal Law and the judgement in this case has not altered the position.

3.4 EXCESSIVE DEFENCE IN THE APPELLATE COURTS AFTER *BRISSON v. THE QUEEN*[102]

3.4.1 The case of *R. v. Simon Wah Man Siu*[103]

This was a murder case where the accused shot dead a person with whom he had had an altercation. He testified that he was about to leave the place when he heard someone yell a racial epithet at him. A moment after that, the deceased came towards his car and pulled something metal from the side of his body. He felt his life was threatened and in response to it, he fired shots into the air and started to drive away. In so doing, he hit a telephone pole. According to the accused, the deceased then started walking towards the car, reached in and nicked his cheek. That again made him feel threatened and in consequence he fired several shots and drove away. The deceased was killed by these shots. At trial the accused was found guilty of second degree murder and was sentenced to life imprisonment without eligibility for parole for ten years.

In the course of the trial, the trial judge instructed the jury to the effect that if they were satisfied that the accused had used more force than was required in protecting his life and repelling the purported attack, he had thereby deprived himself of the defence of self-defence.[104]

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102 *Supra*, fn. 66.

103 12 C.R.(4th) 356. This case was decided on the 4th of March 1992 in the British Columbia Court of Appeal.

104 The direction reads: "[Y]ou've heard evidence that the accused claimed that he acted in self-defence when he killed Davies. *You may find that the accused used excessive force in the circumstances. Should you find that, he thus deprives himself of the defence of self-defence.*" *Ibid.*, at p. 367.

This direction became one of the main grounds of appeal. In the British Columbia Court of Appeal, section 34 (1) and (2) and section 35 of the Code were given meticulous attention and the main task of the court was to decide the validity of the trial judge's instruction to the jury on those provisions.

No objection was taken by counsel for the accused concerning section 34 (1).[105] The appeal hence concentrated on the trial court's direction on section 34 (2), and 35 the essence of which was to deny the accused the defence under section 34 (2) and 35 if the jury were satisfied that his act of defence was excessive.

The Court of Appeal decided that this direction was erroneous in its substance. The reason for this decision could be explained thus: the court explained that there are major differences between section 34 (1) on the one hand and section 34 (2) and 35 on the other, that the trial court in directing the jury on these provisions must take into consideration. The first difference lies in the fact that section 34 (1) relates to cases where there is no intention on the part of the accused to cause death or to inflict serious bodily injury on the victim, whereas the other two could protect the accused even if he was proved to have an intention to kill or cause serious injury to the victim.

Secondly, the language of section 34 (1) entails the proportionality requirement. In contrast, the condition that the accused must be proportionate in his defence does not exist in sections 34 (2) and 35.[106] The trial judge in dealing with

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105 The direction requires the jury to be satisfied that the accused used no more force than is necessary to defend himself from the attack. The direction reads: " It must have been proportional to the force launched against him by Davies. If the force was more than necessary in the circumstances, then the defence of self defence isn't available to him." *Ibid..*, at p. 362.

106 This difference was recognised in the case of *R. v. Mulder* (1978) 40 C.C.C. (2d) 1, where the court says:

these issues appeared not to have taken the distinction seriously when he instructed the jury on the point that the accused must not be excessive in his act of defence against the deceased. Whereas it is acceptable to require the accused not to be excessive in his defence under section 34 (1), the same requirement could not arise in considering section 34 (2) and 35.

The trial judge's direction on sections 34 (2) and 35 might have been construed as an invitation, first to consider whether the conduct of the accused fell within the protection of section 34 (2) or 35, and secondly, to consider whether an additional unstated prohibition against excessive force disqualified the accused from the benefit of that defence. This, as stated in the main ground of the judgement, was held to be substantially erroneous.

3.4.2 The requirement of reasonable belief and proportionality in section 34

Another reason for the rejection of the proportionality requirement as suggested by the trial court stems from the fact that the law has made it a condition that the accused should reasonably believe that his defensive act is really necessary in resisting the attack. The position as required by the law could thus be explained: if the accused reasonably believed that the amount of force used in his defence was necessary at that particular moment, that reasonable belief, if accepted by the jury, would in itself negate the possibility that his defensive act was excessive. The

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"This section [s.37] introduces the concept of 'proportionate force'; it must not be more than is necessary to prevent the assault. There is no similar language in s. 34(2). The jury might well draw the erroneous inference that the degree of force permitted under the two section was the same, . . . "
The same conclusion was also made in the case of *Regina v. Bogue, supra,* fn. 6.

accused's act could only be excessive if he did not believe that the force used was necessary, in which case, sections 34 (2) or 35 of the Code could not be relied upon.

Having said that, however, it was further elaborated that, on failing on sections 34 (2) and 35 it does not follow automatically that the verdict must be murder. The accused could still be convicted of the lesser crime of manslaughter, but not on the ground of the doctrine of excessive force in self-defence, but on the basis of lack of intent to kill or to cause serious injury as stated in other parts of the Criminal Code.

3.4.3 The Court of Appeal's decision and its effect on the doctrine of excessive self-defence

The decision of the Appeal Court may also be viewed as indirectly reaffirming the proposition that there is no room in the Canadian Criminal Code, particularly in sections 34 (2) and 35, for the introduction of the doctrine of excessive self-defence. As far as the two provisions are concerned, it is the belief of the accused based on reasonable and probable grounds that his life and well being are seriously threatened at the time of such an agonising situation that decides his criminal liability. Even if the amount of force would appear, generally speaking, to be more than necessary, if he believed that the manner in which he defended himself was the only way for him to survive, and the jury were satisfied that the belief was reasonably held, he would be acquitted under the terms of the section. However, if the jury decided that his defensive act was unreasonable, he could be found guilty of murder if he were found to have the necessary intent as laid down in section 229 (previously 212 (a)). There simply exists no middle path rule in this respect.

3.4.4 Commentary

The main issue discussed in the Appeal Court was whether or not the trial judge had erred in his charge to the jury regarding section 34 (1) and (2) and section 35 of the Canadian Criminal Code. The direction specified that the accused must not, in his defence, do more than what would be necessary and if his repelling force was excessive that would deprive him of the defence of self-defence.

This direction was, for the reasons already explained, held to be erroneous and led to a substantial miscarriage of justice.[107] The direction, if to be applied, would be tantamount to imposing an unnecessary additional unstated condition to section 34 (2) and 35 of the Criminal Code. This, in the opinion of the court is something undesirable.

In the course of the judgement however, the doctrine of excessive defence and its application in the Canadian courts was also elaborated. Here, the Appellate Court relied heavily on the Supreme Court's judgement in the case *of R. v. Brisson.*[108] The Appeal Court then said:

"Thus, *Brisson* was not a case where the court was pronouncing authoritatively upon the effect of excessive force under section 34 (2)."

The court then quoted the judgement of Dickson J. where he said:

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107 The Appellate Court said: "We are of the view that the charge delivered by the learned trial judge in this case *imposed an additional test* which could well have persuaded the jury that the accused was not entitled to succeed even though his conduct fell within the actual requirements of the sections." (Emphasis added.)
R. v. Simon Wah Man Siu, supra, fn. 103 at p. 373.

108 *Supra*, fn. 66.

"On a reasonable statutory interpretation of section 34 it is apparent that a qualified defence of excessive force does not exist."

Perhaps the strongest opinion regarding the doctrine was voiced when the court urged the need to have clear parliamentary approval of the doctrine if it were to be enforced. In the absence of such approval, there is no need to alter the law which has clearly been laid down in the Criminal Code.[109]

Finally, it has to be said that the validity of the excessive defence defence was not really the primary issue in the Appeal Court's judgement. The importance of the case actually centred on the discussion of the validity of the trial court's imposition of a requirement of proportionality in section 35 and 34 (2). In the course of discussing this central issue, the position of the qualified defence was highlighted. It now appears that there is a growing conviction within the provincial courts, particularly in the aftermath of *Brisson v. The Queen*,[110] that the doctrine which was once unconditionally accepted, (e.g. *R. v. Ouellete*,[111] *R. v. Stanley*[112] and *R. v. Barilla*,[113] all were decided in British Columbia Court of Appeal) has now been disapproved.

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109 The Appellate Court said: "The obviously deliberate intention of the Parliament not to impose a general limitation on the amount of force which may be justified under ss. 34(2) and 35 other than such as the accused reasonably believes is necessary to preserve himself, persuades us that no additional limitation may judicially be implied."
R. v. Simon Wah Man Siu, *supra*, fn. 103 at p. 367.

110 *Supra*, fn. 66.

111 *Supra*, fn. 18.

112 *Supra*, fn. 22.

113 *Supra*, fn. 16.

3.5 THE LAW OF EXCESSIVE DEFENCE IN CANADA: CONCLUSION

The defence of excessive force in self-defence in Canada had, before the Supreme Court's decision in *R v Brisson*,[114] found favour with several provincial Appellate Courts. The judgement of O'Halloran J.A. in *R. v Barilla*[115] is arguably the most authoritative decision as far as the acceptance of the middle path rule is concerned. The series of cases which followed only showed that the appellate court judges saw no difficulties in adopting the essence of the doctrine.

Perhaps one of the most significant judgements accepting the validity of the qualified defence was the Saskatchewan Court of Appeal decision in *R. v. Crothers*.[116] The judges in this case not only applied the doctrine but went further and disapproved the Privy Council decision in *Palmer v. The Queen*[117] and the English Appeal Court case of *R v. McInnes*.[118] This judgement is significant in the sense that those two cases were often regarded as the highest authorities available, as far as the rejection of the doctrine was concerned.[119]

What is particularly interesting about the excessive force defence in Canadian Courts is the fact that it was introduced some thirteen years before the concept of the middle path rule began to emerge in Australia in the case of *R. v. McKay*.[120] On this

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114 *Supra*, fn. 66.

115 *Supra*, fn. 16.

116 *Supra*, fn. 27.

117 *Supra*, fn. 29.

118 *Supra*, fn. 30.

119 The approach taken in the law of self-defence from these two cases were in the end approved by the Australian High Court in *Fadil Zecevic* [1986-1987] 25 A.Crim. R. 163.

basis, it could be said that the application of the doctrine in Canada was not, at least for some time, influenced by Australian decisions. However, the development of the doctrine was not always distinctive in the two jurisdictions. They were in agreement in that firstly, the Australian court in *R. v. Howe*[121] derived the middle path rule from old English cases, and equally the British Columbia Court of Appeal decision in *R. v. Barilla*[122] had drawn its justification from the same authorities.

A second matter of note is that both jurisdictions are in total agreement with regard to the basis of the qualified defence. To have an accused convicted of murder in a case where he reasonably believed, though mistakenly, that the amount of force employed in his defensive act was necessary to preserve his life and physical integrity, was accepted by lawyers in both countries as morally unacceptable. Both jurisdictions were at one that the law needed to differentiate between an accused who committed an unlawful act of homicide with a clear intention to commit murder, and an accused committing homicide under extreme and agonising circumstances.

The rejection of the doctrine in Australia was predominantly based on the fact that the six propositions laid down in *Viro v. The Queen*[123] were altogether too controversial and difficult to operate. Interestingly, the same point of reasoning motivated the decision in *R. v. Brisson.*[124] The rejection of the unpopular propositions occurred even though they had been discussed and approved in the Alberta Court of Appeal case of *R. v. Fraser.*[125] Therefore, even though no

120 *Supra*, fn. 50.

121 *Supra*, fn. 49.

122 *Supra*, fn. 16.

123 *Supra*, fn. 45.

124 *Supra*, fn. 66.

125 *Supra*, fn. 44.

subsequent cases seem to have taken the Alberta Court of Appeal decision seriously, Dickson J., in the Supreme Court found it necessary to make it clear that those tests were unworkable and hence not necessary in Canadian criminal law.

It is hard to say whether the demise of the doctrine in Canada was the result of the Privy Council decision in *Palmer v. R.*.[126] as it was, to certain extent, in the Australian courts.[127] The Supreme Court's rejection of the doctrine was very much due to the unavailability of a clear provision justifying the doctrine in the Canadian Criminal Code. It was strongly proposed that if ever the qualified defence were to be applied in Canada, clear approval of the doctrine had to be made by Parliament.[128] In the absence of such approval, the law remains as stated in the Criminal Code. Based on the Supreme Court's judgement in *R. v. Brisson*,[129] the provisions of Canadian Criminal Code with regard to the law of self-defence evidently do not provide any ground for the application of the qualified defence.

Finally, to date the doctrine of excessive defence has been three times rejected in the Canadian Supreme Court. The judgement in *R. v. Brisson*[130] was

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126 *Supra*, fn. 29.

127 The Australian High Court case of *Fadil Zecevic* [1986-1987] 25 A.Crim.R. 163, officially rejected the doctrine and it was then accepted that the law as regard to self-defence in Australia is as in *Palmer v. R.*

128 N. C. O'Brien in his article "Excessive Self-Defence: A Need for Legislation." 25(4) (1983) Criminal Law Quarterly (Ontario) 441, supported the introduction of the doctrine. While accepting the fact that the doctrine has not been recognised as a result of the Supreme Court's decision in *R, v. Brisson*, the writer asserted that the issue of excessive force can only be resolved by statutory intervention. The writer states: "Legislation could be enacted to introduce the qualified defence of excessive self-defence upon the same lines as the defence of provocation." In the later part of his analysis he reasserted: "The different opinions expressed by many courts throughout the common law jurisdictions reflect the confusion and complexity surrounding the issue and the time may be ripe for statutory intervention."

129 *Supra*, fn. 66.

130 *ibid.*

approved in *R. v. Gee*[131] and one year later in *R. v. Faid.*[132] The Supreme Court's perception on the doctrine is best explained in the judgement of Dickson J. where he asserted:

"The position of Alberta Court of Appeal that there is a "half-way" house outside s. 34 of the Code is, in my view, inapplicable to the Canadian codified system of criminal law, it lacks any recognisable basis in principle, would require prolix and complicated jury charges and would encourage juries to reach compromise verdicts to the prejudice of either the accused or the Crown."

In the light of these views, it has to be said that, until statutory intervention takes place to introduce the qualified defence, the Canadian Criminal Code will remain a bar to the doctrine of excessive self-defence.

131 *Supra*, fn. 15.

132 *Supra*, fn. 92.

CHAPTER FOUR

THE BELIEF OF THE ACCUSED IN SELF-DEFENCE

4.1 INTRODUCTION

In a case of self-defence, two aspects of the accused's belief are scrutinised: first, the accused's belief concerning the situation entitling him to employ force in self-defence; and second, the accused's belief as to the amount of force necessarily required to combat the threat he faces. Mason C.J., in his popular but controversial formulations in *Viro v. The Queen*,[1] takes note of these questions. The first proposition in his directive in that case suggests that the accused must reasonably believe that a situation had come about when he has to use force to defend his life viz., the existence of an unlawful attack which threatens him with death or serious bodily harm. He elaborates further: a reasonable belief of the accused here means a belief which is reasonable based on the circumstances in which the accused found himself.[2]

With respect to the accused's belief as to the amount of force required in his defensive act, the *Viro* formulations suggest that it must be "reasonably proportionate". In other words, it must not be excessive when viewed in the light of the attack threatening his life.[3] The excessiveness or otherwise of his repelling force

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1 (1978) 141 C.L.R. 88.

2 Proposition 1(b) of the formulations stated:
"By the expression "reasonably believed" is meant, not what a reasonable man would have believed, but what the accused himself might reasonably believe in all the circumstances in which he found himself." *Viro v. The Queen*, *ibid.*, at p. 146.

3 Proposition 3 of the formulations stated:

is to be decided by the jury. In a case where the jury is satisfied beyond reasonable doubt that the use of force is excessive, the outcome of the case can either be one of murder or manslaughter, this depending on the accused's belief in the excessive force which he employs. If he knows that the force used is indeed excessive, he may be convicted of murder. If he believes that his conduct is reasonably proportionate,[4] he will be convicted only of manslaughter. Thus, in this part of the proposition, the central point is the requirement that the accused must have reasonably believed that his defensive force is proportionate.

These formulations have, of course, been revised. The majority decision in the Australian High Court's case of *Fadil Zecevic*[5] has essentially clarified many of the uncertainties of the Australian law of self-defence which pertained at the time when *Viro* was decided. The most significant outcome of *Zecevic* is the demise of the doctrine of excessive force in self-defence. Nevertheless, the High Court retained the traditional approach in dealing with self-defence defence; namely the distinction between the accused's belief concerning the threat and the belief as to the force requiring to be used in the defence. The English courts, on the other hand, also presuppose the importance of this distinction as is shown in the decisions subsequent to *Palmer*. The two sets of belief will now be dealt with in turn.

"If the jury is not satisfied beyond reasonable doubt that there was no such reasonable belief by the accused, it must then consider whether the force in fact used by the accused was *reasonably proportionate* to the danger which he believed he faced." *Viro v The Queen*, *ibid.*, at p. 147.

4 It is to be borne in mind that this consideration was made at the time when the accused has already been considered by the jury to have been excessive in his self-defence.

5 [1986-1987] 25 A. Crim. R. 163.

4.2 BELIEF CONCERNING THE THREAT[6]

4.2.1 The English courts and the belief

In English courts it has been consistently stated that an honest but mistaken belief by a self defender as to the fact or nature of an attack on himself or another will be no answer to a charge unless it is based on reasonable grounds - a purely objective test was applied. This was the prevailing view until 1983, when the landmark decision of *R. v. Williams*[7] was handed down. Because of its importance, the case needs some elaboration.

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6 The distinction between the accused's belief in the occasion enabling him to use force in exercising his right to defend himself and his belief in the necessary amount of force required in the course of the defence has often been mixed. For instance, J.C. Smith in his discussion on self-defence appears not to be particularly concerned with this distinction. The cases of *R. v. Williams* [1987] 3 All ER 411 and *R. v. Beckford* [1987] 3 All ER 8, were discussed in his work to ascertain the belief as to the amount of force in self-defence. (These two cases will be dealt with later in this chapter.) J.C. Smith "*Using Force in Self-Defence and The Prevention of Crime.*" (1994) 47 Current Legal Problems 101. The question concerning the accused's belief in these two cases, in actual fact, is more related to the belief as to the threat in self-defence.
Marianne Giles in her article, "*Self-Defence and Mistake: A Way Forward.*" 53 Modern Law Review, 187, on the other hand makes a clear distinction between the two sets of belief. The cases of *R. v. Williams* and *Beckford v. R.* were therefore cited in the discussion of the first part of the belief.
S.M.H.Yeo in his commentaries on the development of the law of self-defence in Australia makes a distinction between the two parts of the belief. "*Self- Defence: from Viro to Zecevic*" 4 Australian Bar Review, 1988, "*New Development in The Law of Self-Defence in Australia.*" (1987) 7 Oxford Journal of Legal Studies 489, and "*The Element of belief in Self-Defence*", 12 Sydney Law Review 132.
In my discussion, the belief concerning the threat and the belief as to the necessary force required will be separately elaborated.

7 [1987] 3 All ER 411.
The trend towards accepting the subjective belief of the accused as to the circumstances of an alleged offence was first decided by the House of Lords in *D.P.P. v. Morgan*, [1976] AC 182, a rape case. The decision in *R. v. Williams* is, nevertheless, a landmark decision in the sense that the trend prevailing in *D.P.P. v. Morgan* was for the first time accepted in a self-defence case.

M saw a youth rob a woman in a street. He caught the youth, but the latter managed to break from his grasp. M chased and caught the youth for the second time, knocking him to the ground. The appellant who had only seen the later stages of the incident, got involved in trying to free the youth. M tried to explain the situation. The only mistake he had made was, in explaining the true situation, he claimed to be a police officer, which was untrue, and he therefore could not produce the warrant card when asked for. A struggle followed, and the appellant assaulted M. He was charged with assault occasioning actual bodily harm contrary to section 47 of the Offences against the Person Act 1861. He pleaded self-defence and in his argument claimed that he honestly believed that the youth was being unlawfully assaulted by M.

In the trial court the jury was instructed as to the effect that the appellant's belief in the occasion has to be based on reasonable grounds. The appellant was thereafter convicted on the basis that his honest belief was not objectively reasonable. The appellant appealed on the ground that the judge misdirected the jury in telling them that his mistake had to be reasonable. Lord Lane C.J. in the course of his judgement stated:

"In a case of self defence, . . . if the jury came to the conclusion that the defendant believed, or may have believed that he was being attacked. . . . and that force was necessary to protect himself. . . , then the prosecution has not proved their case. If however the defendant's alleged belief was mistaken and if the mistake was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected. Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely upon it."[8]

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8 *R. v. Williams*, *ibid.*, at p. 415.

This judgement defends the proposition that the accused who sets up self-defence is to be judged on the facts as he honestly believed them to be, whether or not his belief was reasonable - a clear departure from the objective reasonableness test.[9]

Lord Lane's judgement in favour of subjective reasonableness was approved and followed by the Privy Council in the case of *Beckford v. R.*,[10] in which it was decided that an honest albeit mistaken belief of the accused was a justification for the use of force in self-defence. The facts of the case were that a police officer was investigating a report that an armed man was terrorising and menacing people in a house. When he arrived at the house, the suspected criminal ran off. There was conflicting evidence as to the subsequent events. The accused claimed that he fired towards the deceased in the belief that he (the deceased) was armed and intended to fight for his escape to the extent of harming his (the accused's) life as well as the life of a police colleague. (The prosecution, on the other hand, argued that the deceased was surrendering at the time when he was shot.) In the trial court he was convicted of murder on the ground that the belief was not reasonable and that the accused failed this purely objective test. In the Court of Appeal of Jamaica, it was held that a belief that the circumstances required self-defence had to be reasonably, and not only

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9 The facts of this case show that the accused was indeed reasonable in his belief that the accused unlawfully assaulted the thief. This is based on two reasons:
i)The fact the accused only saw the later part of the incidence and therefore was not aware of the true situation,
ii) The fact that M was lying in his claim that he was a police officer. The fact that he failed to produce the identity card necessarily required to prove his claim was good enough to suggest that the accused was not unreasonable in his belief (his belief that M was lying and therefore unlawfully assaulting the thief). Thus, every reasonable man in his position would have the same belief.
Now, what would be the position if M was indeed a police officer and produced his identification. However, because he was not in uniform and acted "violently" in public against someone whom the accused believed to be innocent, the accused still disregarded his (M's) claim and assaulted him in the belief that his act was in defence of others. Would his honest belief under such circumstances fall within the scope of justifiable self-defence? The decision in *Beckford* suggested that it might well be so.

10 [1987] 3 All ER 8.

honestly held. On appeal to the Privy Council, it was held that when an accused acts under a mistake as to the facts, he is to be judged according to his mistaken belief of the facts regardless of whether, viewed objectively, his mistake is reasonable. The substantial issue is what he actually believes at that moment; if his belief is a genuine and honest one, that would itself justify his reacting in defence of his life, irrespective of whether his belief falls within the requirement of the impersonal objective reasonable test.

In the Court of Criminal Appeal decision in *Gaynor Oatridge*,[11] the same issue came before the court. The accused was charged with the murder of her co-habitee. The accused claimed that on the night of the offence the victim was drunk and abusive and had uttered threats to kill her. He had seized her throat and squeezed it. In the belief that he was attempting to kill her, the appellant picked up a kitchen knife and stabbed him. One of the grounds of her defence was that she acted in defence of her life.

The trial judge in his summing up gave the conventional direction on the need for proportionality between the force used and the nature of the attack. No direction was made on the mistaken belief of the accused, and upon this direction, the accused was convicted by a majority of manslaughter. In the Court of Criminal Appeal the main argument against the trial court's decision was the rejection of the accused's mistaken belief. This argument was extensively elaborated by the Appeal Court judges. Mustill L.J. in reading the court's judgement elaborated:

"In many cases of self-defence the following questions must be asked:

(1) Was the defendant under actual or threatened attack by the victim?

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11 (1992) Crim. App R. 367.

(2) If yes, did the defendant act to defend himself against this attack?

(3) If yes, was his response commensurate with the degree of danger created by the attack? In answering this question allowance must of course be made for the fact that the defendant has to act in the heat of the moment and cannot be expected to measure his response exactly to the danger. . . . . There are however occasions where a further question must be asked:

(1a) Even if the defendant was not in fact under actual or threatened attack, did he nevertheless honestly believe that he was? If this question was answered in the affirmative (or, more correctly, the prosecution does not establish that it should be answered in the negative), then the third question must be modified, so as to read:
(3a) Was the response commensurate with the degree of risk which the defendant believed to be created by the attack under which he believed himself to be?"[12]

It was decided that the honest, albeit mistaken, belief of the accused was not so fanciful as to require exclusion from consideration.

In the light of this decision, a plea of self-defence may be successfully pleaded even where there is no actual threat, so long as the jury is satisfied that the accused honestly believed that his life was in serious danger and that an act of defence was necessary to protect the accused's life. In other words, the accused's honest mistake may not be a bar to his plea of self-defence.

This decision, stressing, as it does, the importance of the accused's genuine and honest belief, is in line with the Privy Council's judgement in *Beckford's*[13] case,

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12 *Ibid.*, at p. 370.

13 *Supra*, fn. 10.

although their Lordships in *Gaynor Oatridge* made no reference to the Privy Council's decision. One may conclude, then, that the English courts have inclined towards accepting the accused's honest belief and avoiding making decisions predominantly based on the truly objective impersonal reasonable man test.

4.2.2 Belief concerning the threat: the Australian experience

In Australia, the first proposition laid down in *Viro v. The Queen*[14] has been the main source of reference in determining the accused's reasonable belief in the threat. One line of authorities has sought to elaborate further the meaning of the expression "reasonable belief based on the circumstances in which an accused's found himself". On this point, the court in *Helmhout v. R.* said:

"The test of whether an accused's belief was reasonable is not whether an unlawful attack was being made upon him, nor even whether the hypothetical reasonable man in the accused's position would have believed that an unlawful attack was being or was about to be made on him. The test is whether the accused himself might reasonably have believed in all the circumstances in which he found himself that an unlawful attack was being or was about to be made upon him."[15]

This judgement was quite explicit in its rejection of the hypothetical reasonable man test. The term reasonable, then, is confined only to what is reasonable in the eyes of the accused himself and not according to the objective standard of reasonableness.

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14 *Supra*, fn. 1.

15 (1980) 49 F.L.R. 1 at p. 4

Another line of authorities, despite the clear wording in *Viro v. The Queen*, seeks to replace reasonable belief with honest belief.[16] In the case of *Morgan v. Colman*,[17] the Australian Court of Criminal Appeal reformulated the first proposition in *Viro* in the following terms:

"It is both good sense and good law that where a person is subjected to, or genuinely fears, an attack. . . . he may use force to defend himself. . . . . In determining what were the circumstances that a person believed to exist. . . . regard may be had to the grounds of that person's belief and to whether they were reasonable. The reasonableness or the reverse of such grounds is not, of itself, decisive of the existence or non-existence of the belief."[18]

Uncertainty was in the end resolved by the decision of the Australian High Court in *Zecevic*.[19] An analysis of *Zecevic* discloses that the High Court has treated the issue quite distinctly from the way in which it has been treated in the English courts. In fact, the Australian courts have consistently maintained that under the law of self-defence, the accused must have honestly believed, on reasonable grounds, that he was being attacked. The first and second formulations in *Viro* had unambiguously explained this. In *Zecevic*, despite the rejection of these formulations, the court still retained the requirement of honest and reasonable belief. Counsel for the appellant in *Zecevic* contended that the law relating to self-defence should not require that an accused person's belief that he is being threatened with death or serious bodily harm be a reasonable belief: it is sufficient, that an accused person had hold an actual belief

16 This would involve judging the accused's belief on a purely subjective reasonableness test. The English courts have already adopted this approach. *R. v. Williams*, *supra*, fn. 7, *R. v. Beckford*, *supra*, fn. 10, and *Gaynor Oatridge*, *supra*, fn. 11.

17 [1981] 27 S.A.S.R. 334.

18 *Ibid.*, at p. 336-337.

19 *Supra*, fn. 5.

of that kind whether reasonable or not.[20] This argument was rejected by the High Court. The court relied on the historical development of the law of homicide in its conclusion that the accused's belief concerning the threat had to be reasonable and therefore rejected the appellant's counsel argument. Wilson, Dawson and Toohey JJ. in their joint judgement stated:

"[T]he history of the matter serves to explain why the requirement of reasonableness, which was the requirement of excusable homicide, has remained part of the law of self-defence. Moreover, it establishes why that requirement ought not to be regarded as a definitional element of the offence in question but as going rather to exculpation."[21]

This judgement demonstrates that the Australian courts differ in their attitude from that of the English courts. They require a reasonable belief, but judge the reasonableness not on a hypothetical person test, but rather on the accused's perception of the circumstances he was under. This amounts to a mixture of subjective and objective reasonableness.

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20 *Ibid.*, at p. 170.

21 *Ibid.*, at p. 171.

4.3 BELIEF AS TO THE FORCE APPLIED

4.3.1 The approach of the English courts

Another issue presenting itself for discussion in self-defence cases is the belief of the accused as to the amount of force necessarily required in his defensive conduct. The question here is: according to what measurement should this belief be decided? The Criminal Law Act 1967 threw some light on this matter. This Act stated that the accused may use, in his defence, "such force as is reasonable in the circumstances".[22] A glance at the case of *Palmer v. R.*[23] also reveals the same approach.[24] Nevertheless, the question arises as to what kind of reasonable belief is required by this test: is it a traditional, but orthodox, conception of reasonableness, or a pragmatic mixture of subjective and objective test of reasonableness?[25] This question merits detailed discussion.

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22 Criminal Law Act (1967) s. 3(1)

23 [1971] 1 All ER 1077.

24 Lord Morris in his judgement explained:
"In their Lordships view the defence of self-defence is one which can be and will be readily understood by any jury. . . . . It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, *what is reasonably necessary.*" (emphasis added). *Palmer v. R, ibid.*, at p. 1088.

25 It is important to note here that the debate as to whether a belief need only be honest or must also be reasonable, is confined to the belief concerning the threat. With regard to the belief as to the necessary force required in the defence, both English as well as Australian law required that the belief be a reasonable one. Nevertheless, the word reasonableness here conveys two different meanings; firstly, whether a reasonable person in the accused's position would have believed the force applied by the accused to be reasonably necessary; secondly, whether the accused believed on reasonable grounds that the force applied by him was reasonably necessary. The former advocates a purely objective reasonableness whereas the latter is a mixture between subjective and objective reasonableness.

A good starting point is the Privy Council's judgement in *Palmer v. R.*[26] Most commentators commenting on this case seems to have agreed upon one thing - an accused person taking shelter under self-defence has to have believed - on reasonable grounds - that the amount of force used was necessary.

Having said that, however, Lord Morris in delivering the majority judgement in the Privy Council stated: "if there has been an attack so that the defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action."[27] This means that, even though the accused's belief is required to be a reasonable one, the trier of facts is required to take into consideration the accused's position in the agony of the moment. The statement also means that, even though it has to be a reasonable belief, the jury should not at the same time look at the case with excessive rigidity and strictness. Allowance must be made for any excitement, affront and distress that the accused might have experienced. Leniency was thus recommended in considering the accused's reasonable act.

Taking this point further, Lord Morris elaborated: "If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary, that would be most potent evidence that only reasonable defensive action had been taken."[28] This statement had clearly appealed to the jury in considering the accused's predicament at that difficult moment. It seems that the court was asking for tolerance in favour of the accused before any conclusion could be reached by the jury. The accused's honest belief, and his spontaneous reaction to the attack are paramount at this point. As already stated,

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26 *Supra*, fn. 23.

27 *Ibid.*, at p. 1088.

28 *Ibid.*

these could serve as the most potent evidence in determining the reasonableness of his defensive conduct.

Now, what would be the effect of these two statements of law on the determination of the authenticity of the accused's defensive act? If "reasonable belief" is still interpreted as a purely objective reasonableness, perhaps Lord Morris's statements would not be necessary. On the other hand, if the statements were to be explained in accordance with the overall judgement in the case, it could lead to the conclusion - the accused's defensive force is now judged by the test of reasonableness, but, in ascertaining the reasonableness of this act, consideration must also be given to his belief at that particular time. This would mean that the law of self-defence envisages a mixed subjective and objective reasonableness in justifying the accused's use of force in the defence.

This new conception of reasonable belief derived from *Palmer's* decision was adopted in the English Court of Appeal case of *R. v. Shannon.*[29] The judges in the Criminal Court of Appeal emphatically stressed the need to have a logical and practical interpretation of Lord Morris's statement of law in *Palmer v. R.*[30] To judge the accused's belief solely on the hypothetical person test was not regarded as truly explaining the law as it had been interpreted by the Privy Council. The court concluded that the logical interpretation of *Palmer* is to accept the need for a mixed objective and subjective belief. Lord Ormrod L.J. in delivering the court's judgement stated that in every case of self-defence a distinction has to be made between an act essentially defensive in character and acts which are essentially offensive, punitive, or retaliatory in character. In considering this distinction, the correct approach would be to consider the fact that the accused could not be expected to weigh to a nicety the

29 [1980] 71 Cr. App. R. 192.

30 *Supra*, fn. 23.

measure of his necessary act of defence and that the accused's honest and distinctive belief that his act was necessary is also essential in judging the reasonableness of the defensive conduct.[31] This judgement of the Criminal Appeal Court laid down a solid grounding in the application of the "partly subjective and partly objective reasonableness".

The case of *R. v. O'Grady*,[32] another decision by the Criminal Court of Appeal, reaffirmed this view. In this case, even though the court was willing to accept the honest albeit mistaken belief of the accused, it denied him the defence of self-defence on the ground that the mistaken belief resulted from self-induced intoxication.[33] Thus, the reason for the court's rejection of self-defence plea was not because of the application of a purely objective test, but rather because the accused's state of mind denied him the defence.[34]

In the case of *R. v. Whyte*[35] Lord Lane C.J. in his judgement referred to the case of *Palmer v. R.*[36] and *R. v. Shannon,*[37] cases which he regarded as of substantial binding authority. In relation to the issue of the accused's reasonable defensive conduct, the court regarded the two previous decisions as requiring the jury to take

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31 *Supra*, fn. 29 at p. 196.

32 [1987] 3 All ER 421.

33 Lord Lane C.J. in delivering the judgement stated:
"We have come to the conclusion that, where the jury are satisfied that the defendant was mistaken in his belief that any force or the force which he in fact used was necessary to defend himself and are further satisfied that the mistake was caused by voluntarily induced intoxication, the defence must failed." *R. v. O'Grady*, *ibid.*, at p. 423.

34 It appears that if the accused in this case had not been voluntarily intoxicated, there is a possibility that he could have relied on the defence of self-defence.

35 [1987] 3 All ER 416.

36 *Supra*, fn. 23.

37 *Supra*, fn. 29.

into account the honest and instinctive belief of the accused at the very moment of his defensive action. Lord Lane C.J. said:

"In most cases, where the issue is one of self-defence, it is necessary and desirable that the jury should be reminded that the defendant's state of mind, that his view of the danger threatening him at the moment of the incident, is material. *The test of reasonableness is not, to put it at its lowest, a purely objective test.*"[38]

This statement explicitly reveals the true interpretation of the reasonable belief requirement in the English courts. As a result of Lord Lane's judgement, the hypothetical person test can be said to have been replaced by a new test which requires the jury to consider what the accused thought or perceived, and to decide on the basis of how a reasonable man, with the accused's characteristics interpreted the circumstances.

4.3.2 *R. v. Scarlett*[39] and its effect on the question of the accused's belief

The decision of the Criminal Court of Appeal in *R. v. Scarlett*[40] however, signifies a departure from the *Palmer* principle. This decision appears to involve an

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38 *R. v. Whyte*, *supra*, fn. 35 at p. 418. (Emphasis added).
It was commented by S.M.H.Yeo in his article "*The Element of Belief in Self-Defence*" 12 Sydney Law Review 132 at p. 146 that in England the overwhelming preference by the courts is for the purely objective reasonable test. The writer in his commentary referred specifically and solely to the case of *R. v. Williams*. It has to be said that by virtue of Lord Lane's judgement this observation was incorrect. The case referred to in his comment was not essentially the most authoritative in discussing the accused's belief concerning the force applied. As already discussed,(*supra,* at p. 133-135) the case of *R v Williams*, *supra*, fn. 7, is best referred to in the discussion of the belief as to the threat.

39 [1993] 4 All ER 629.

40 *Ibid.*

abandonment of the *Palmer* approach, which propagates a partly subjective and partly objective reasonable test. The decision merits closer examination.

The facts in *Scarlett* can be stated briefly. The defendant, the landlord of a public house, was convicted of unlawful act manslaughter following his use of force to eject the victim, who had entered the public house after closing time the worse for drink. In the trial court, the judge stated that if the jury concluded that the accused had used more force than was necessary in the circumstances in the bar, and if they were satisfied that he had caused the deceased to fall and strike his head, the appellant was guilty of manslaughter; of which offence he was later convicted.

This was held by the Court of Appeal to be a misdirection. The decision was reversed by the Court of Appeal, where Beldam L.J. concluded:

"Further they (the jury) should be directed that the accused is not to be found guilty merely because he intentionally or recklessly used force which they consider to have been excessive. They ought not to convict him unless they are satisfied that the degree of force used plainly more than was called for by the circumstances as he believed them to be and, provided he believed the circumstances called for the degree of force used, he is not to be convicted even if his belief was unreasonable."[41]

The question now is: has this judgement rejected completely the established principle applied in previous cases? According to *Scarlett*, the defendant could justify the most extravagant actions provided he subjectively believed the circumstances warranted it. This would also mean that the accused's belief, based on the circumstances in which the incident occurred, had been elevated from "potent

41 *Ibid.*, at p. 636.

evidence" as concluded in *Palmer*, to an overreaching new substantive defence. The decision had clearly interpreted the case on a purely subjective term.

The effect of *Scarlett* on the test of accused's belief is that it leads to a departure from the statement of law pronounced in *Palmer* and interpreted and applied in cases following it. The judgement in *Palmer* retained the requirement of necessity as well as proportionality in the accused's act. However, it also gave considerable weight to the accused's belief based on the circumstances of the case as the accused found himself. Therefore the test is not a purely objective one, although, at the same time, it does not propagate an entirely subjective reasonableness. The decision in *Scarlett* on the other hand, disregarded the need for the jury to decide on the reasonableness of the accused's act, suggesting instead a purely subjective reasonableness. This notion of supporting the subjectivist position on criminal liability would appear to contradict the approach adopted in *Palmer,* and, for that matter, the well established rule already applied in courts in other cases.

Some two years after *Scarlett* was decided, it was heavily criticised in the case of *R. v. Owino*.[42] The appellant in this case was convicted on two counts of assaulting his wife occasioning her actual bodily harm (injuries to her head and her thumb). The appellant's argument regarding these counts was that any injuries his wife had sustained through his actions were caused by reasonable force used to restrain her and to stop her from assaulting him. The members of the jury received no direction on self-defence until, about an hour-and-a-half after retiring, they sent a note in effect asking for such a direction. The judge then directed them on the issue to the effect that the prosecution must prove that the defendant did not believe that he was using reasonable force. On appeal it was argued that the judge inadequately directed the jury on self-defence, by reason of (a) his failure to state that the test of

42 [1995] Crim. L. R. 743.

what force was reasonable was subjective, and (b) the delay of an hour-and-a-half before the direction was given.

The appellant's appeal was rejected, the Court of Appeal justifying its decision by explaining the true nature of *Scarlett's* case. The court asserted that the judgement of Beldam L.J. in *Scarlett*, when read in context and properly understood, was not meant to say that a person was entitled to use any degree of force he believed to be reasonable, however ill-founded the belief.[43] This diplomatic treatment of Beldam L.J.'s judgement was understandable. The fact of the matter was that, the Court of Appeal in *Owino* did not want to allow the accused's subjective belief to be determinant in considering the reasonableness of his repelling force. The Appeal Court concluded that the law was as set out by Lord Lane L.J. in *R. v. Williams*: a person may use such force as is (objectively) reasonable in the circumstances as he (subjectively) believes them to be. This test was the one applied in *Palmer v. R.*.

The question to be addressed now is this: what significance does *Scarlett* have in the development of the law of self-defence, or more specifically, what significance does it have for the issue of the accused's belief in his plea of self-defence? It would also appear that, in the light of *Owino*, *Scarlett* had contributed nothing to the law of self-defence at all.[44] Alternatively, if *Scarlett's* principle were to be strictly followed, the consequence of it would be to allow the accused's mistaken belief, no matter how erroneous it was, as long as it was honestly and genuinely held, to be a sole determinant factor in his self-defence claim. Hence the accused's chance of getting away from any criminal liability would be greater than

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43 *Ibid.*, at p. 744.

44 It was thus commented: "It seems that we must now take it that Scarlett added nothing to the law as stated in *Gladstone Williams* and is best not referred to in future, as far as this aspect of the decision is concerned. "*R. v. Owino*, *ibid*,at p. 744.

ever. On top of that, the long standing rule requiring a reasonable man test would be completely abolished.

4.3.3 Summary

The English courts in determining the accused's belief as to the amount of force acceptable in his defence have heavily relied upon the Privy Council's decision in *Palmer v. R.*,[45] in which the approach taken was, that the accused's belief is to be judged according to what he reasonably thought to be necessary. The reasonableness of this belief then is decided by the jury. This is a mixed subjective and objective test.

This principle was then applied in the Court of Appeal in a series of subsequent cases. The case of *R. v. Shannon*,[46] *R. v. O'Grady*[47] and *R. v. Whyte*[48] were included in these. Nevertheless, this notion of having a "half subjective" and "half objective" reasonable test was then challenged in the case of *R. v. Scarlett*.[49] The Court of Appeal in that case disregarded the prevailing test by adopting a purely subjective standard of belief.

The decision of *R. v. Owino*[50] has effectively returned to the principle already in operation before *Scarlett*, which, though not necessarily expressly, rejects the

45 *Supra*, fn. 23.

46 *Supra*, fn. 29.

47 *Supra*, fn. 32.

48 *Supra*, fn. 35.

49 *Supra*, fn. 39.

50 *Supra*, fn. 42.

Scarlett's purely subjective reasonableness approach. The law applicable since has then reverted to a mixed subjective and objective reasonable standard of belief.

4.3.4 Belief as to the amount of force required: the Australian experience

In Australia, by virtue of the *Viro* formulations, there is a legal rule that for self- defence to apply, the force exercised by an accused against his assailant must be reasonably proportionate to the danger which he reasonably believed he faced. The Australian High Court's case of *Fadil Zecevic*,[51] however, had taken the view that the proportionality between the force exercised by the accused and the harm threatening him is but one of many factors left to be considered by the jury in deciding whether the accused's conduct was reasonably necessary in self-defence. The court asserted that the test is, "whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did."[52] At this point, the majority judgement in *Zecevic* seems to have departed from the third and fourth directive in the *Viro* formulations. It could well be said that by virtue of *Zecevic*, the third and fourth "requirement of proportionality" in *Viro* is now replaced by the half subjective and half objective test as propounded in *Zecevic.*

Another point to note is that, in *Zecevic* the High Court had unhesitatingly expressed its confirmation on the law of self-defence set forth in *Palmer v. R.*[53] At

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51 *Supra*, fn. 5.

52 *Ibid.*, at p. 174.

53 Mason C.J. in his separate judgement in the case stated:
"The law on this topic (self-defence) in Australia will then be conform to the law in the United Kingdom as expounded in *Palmer* and *McInnes*." *Fadil Zecevic*, *ibid.*, at p. 168.
Wilson, Dowson and Toohey JJ in their joint judgement said:

least in respect to the accused's belief on the degree of required force in self defence, the Australian courts were in line with the application of the law as it is in *Palmer v. R.* This would mean, the accused defensive act is now considered to be based on a mixture of subjective as well as objective reasonableness.

This approach was adopted and confirmed in the New South Wales Supreme Court's case of *Glen William Conlon.*[54] The facts of the case were that the accused shot dead two men in his farmhouse. Both of the deceased were found to have stolen the accused's marijuana plant. Evidence was also led at the trial that the accused was attacked and seriously assaulted in his own house. The primary question left for the jury to decide, then, was whether the accused's had been reasonable in his employment of force in the defence which lead to the death of the two intruders.

The Supreme Court in this case was confronted with the argument that the decision as to whether there were reasonable grounds for any belief on the part of the accused that it was necessary in self-defence to do what he did, was a completely objective one. This argument was categorically rejected. The court's rejection was based on *Zecevic* where, as the Supreme Court puts it: ". . . . that it is the belief of the accused, and not that of the hypothetical reasonable person in the position of the accused, which has to be reasonable."[55] Hunt C.J. then added: "It seems to me that it would require a very clear statement by the High Court that it had intended to substitute a completely objective assessment for that of a mixed objective and subjective nature as had been posed in Viro."[56]

"Finally, it (the law relating to self-defence) has the effect of expressing the common law in terms which are in accord with the views expressed in *Palmer* (adopted in England in *McInnes*) and which are generally consonant with the law in the Code States." *Ibid.*, at p. 176.

54 (1993) 69 A. Crim. R. 92.

55 *Ibid.*, at p. 98.

The effect of this decision is twofold:

1. It rejects the attempt to have the accused's belief be judged according to a purely objective standard of reasonable belief as opposed to the mixed subjective and objective reasonableness,

2. As evidenced in the judgement, the notion of considering seriously the accused's honest belief and of leaving it for the jury to judge its reasonableness was in fact a practice originated in *Viro*. It is also of considerable significance in demonstrating that even though the case of *Viro* was rejected in *Zecevic*, some of its formulations, especially in relation to the question of the accused's belief, have survived.

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56 *Ibid.*, at p. 99.

4.4 BELIEF IN SELF-DEFENCE: CONCLUSION

In England, the case of *Palmer v. R.*.[57] had clearly played an important role in the modern law of self-defence, particularly in introducing the new conception of reasonableness. In Australia, the case of *Fadil Zecevic*[58] has changed completely the law of self-defence in Australian states with Common Law jurisdictions, where it was previously entangled with the controversial doctrine of excessive defence; now the doctrine has been abolished in favour of a "straightforward interpretation" of *Palmer v. R.*. The case had now been considered as the main source of guidance in dealing with a self-defence claim. This is evidenced by the Supreme Court of New South Wales judgement in *Conlon's*[59] case, where heavy reliance was made on *Zecevic*.

The English court's approach to the case of self-defence could be explained in these terms: with regard to the accused's belief relating to the occasion allowing him to exercise some force in retaliation to an attack or what he believed as an attack threatening seriously his life and bodily integrity, the law regards his honest and genuine belief to be the deciding factor. Even in the event where it is objectively unreasonable, if it is honestly thought to be necessary, this will entitle him of the defence of self-defence.

In relation to the accused's defensive conduct (the amount of force he employed in his defence) the judgement of Lord Morris in *Palmer* suggests a mixture of "half subjective" and "half objective reasonableness". This interpretation was

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57 *Supra*, fn. 23.

58 *Supra*, fn. *5*.

59 *Supra*, fn 54.

affirmatively applied in the cases of *R. v. Shannon*,[60] *R. v. O'Grady*,[61] and *R. v. Whyte*.[62] The test is, what would a person in the accused's position be doing in the circumstances. This is not a purely objective reasonableness.

In similar circumstances, the Australian courts would most probably rely on the accused's reasonable belief, as described in *Viro v. The Queen*,[63] to determine the reasonableness of the accused's belief as to the existence of an attack. This principle, despite the demise of *Viro* formulations on the doctrine of excessive defence, still survives.

As the judgement in *Zecevic* makes clear, the same approach as that adopted in English courts would be applied in justifying the accused's defensive force. This means that regard must be had to the accused's instinctive and spontaneous reaction on the occasion; the court could not expect the accused to weigh precisely the exact measure of self-defensive action which is required. This postulates a mixed subjective and objective reasonableness.

In judging the accused's belief concerning the reaction to the threatening occasion, the Australian High Court has ruled that this is to be assessed according to the accused honest and reasonable belief that the force applied by him was necessary. The orthodox purely objective hypothetical reasonable man test has therefore been substituted by a more compassionate, just and logical approach.

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60 *Supra*, fn. 29.

61 *Supra*, fn. 32.

62 *Supra*, fn. 35.

63 *Supra*, fn. 1.

Finally, it should be pointed out that the distinction between the objective and subjective test, when applied to the question of reasonable force in self-defence, although semantically clear, is rather blurred in practice. The fact of the matter is that the issue of one's belief is intrinsically too subjective and that it is highly unlikely that one would be able to determine that belief with absolute certainty. It has to be said that in any case where the question of the accused's belief is at issue, whatever formulations and theories are applied, the conclusion derived still framed in terms of probabilities. Nevertheless, the approach presently finding favour in the courts has certainly proved more sensible. The tendency of accepting the accused's belief on what he actually perceived in the agonising circumstances - especially in considering the accused's belief as to his defensive action - is arguably the best available way of achieving a satisfactory conclusion in cases of self-defence.

CHAPTER FIVE

THE DEFENCE OF SELF-DEFENCE AND THE THEORY OF BATTERED WOMAN SYNDROME

A. THE RELATIONSHIP BETWEEN SELF-DEFENCE AND THE BATTERED WOMAN SYNDROME

5.1 INTRODUCTION

The theory of battered woman syndrome has pre-occupied the criminal law system of many common law jurisdictions for the past decade. Many suggest that battered woman - those who constantly been physically and mentally abused, and those who live under constant threat to their life from their partners - could plead self-defence when they kill their violent partners.

In most cases, the battered woman kills her spouse in two situations. Firstly, it happens at the time when the two parties are involved in a direct physical confrontation, or what could be termed "traditional confrontation cases", or more accurately - at the time when the accused is defending herself from a violent act on the part of her partner. In this instance, the argument with regard to self-defence is quite straightforward in favour of the accused - straightforward in the sense that a successful self-defence claim could depend upon the fulfillment of the traditional self-defence requirements; the test of imminence, proportionality and also the

consideration of duty to retreat. In other words, the battered woman case here is in fact just another case of an ordinary self-defence.[1]

Secondly, there are cases where the battered woman kills her partner at the time when there is no actual physical confrontation, which also known as "non-traditional confrontation cases." The killing took place when the partner is asleep, laying down intoxicated, or has turned his back from the accused; in short, at a time when the husband is not behaving abusively. The reason for the killing is arguably mainly psychological. The pressure of living under a constant threat to her life from the partner and the traumatic experience of being continuously beaten leads the battered woman to believe that she would in the end be killed. Often this belief is not merely the accused's[2] illusion but is supported by the fact that she has been repeatedly threatened with killing and that the assault has always been too serious and threatening. In this instance, the preliminary question is: can the accused woman really plead self-defence under the existing self-defence law? Does the doctrine of self-defence really suit the battered woman's case, or should the law be modified to account for the battered woman's situation? What are the difficulties in pleading self-defence?

Before continuing with this discussion of battered woman and self-defence, it is to be noted at the very outset that self-defence is not the only option for a battered woman in court. In quite a number of instances, the accused has claimed diminished responsibility. In some cases provocation was the main defence. In others, the

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1 It is to be noted however that in some exceptional cases a battered woman has had also to prove battered woman syndrome in courts in confrontational self-defence cases. The reason for introducing the syndrome is to prove the reasonableness of the "accused's" (the battered woman's) perception of the danger. *Smith v. State* 247 Ga. 612, 277 S.E.2d 678 (1981), *Strong v. State* 251 Ga. 540, 307 S.E.2d 912 (1983), *State v. Borders* 433 So. 2d 1325 (Fla. Dist. Ct. App. 1983). P.L. Crocker, "*The Meaning of Equality for Battered Woman Who kill*", (1985) 8 Harvard Women's Law Journal 121.

2 The term "accused" hereinafter used to denote a battered woman pleading self-defence.

duress defence has been established. Those defences would, at the most, if successfully pleaded, hold the accused guilty only of manslaughter instead of murder. In contrast to those defences, if the battered woman accused's self-defence claim is accepted, she will be entitled to a complete acquittal. For this reason, there are strong reasons on the part of the battered woman to plead self-defence.

5.2 THE BATTERED WOMAN AND THE TRADITIONAL "IMMINENCE" SELF-DEFENCE'S REQUIREMENT

As a settled and uncompromising condition, any self-defence claim must, first of all, establish that the accused was in fact confronted by an attack which was not only serious in nature but also so imminent that it would be impossible for him to resort to other means to avoid the danger. In the case of *Devlin v. Armstrong*[3] for example, Lord MacDermot held that the plea of self-defence may afford a defence where the parties raising it uses force, not merely to counter an actual attack, but to ward off or prevent an attack which he has honestly and reasonably anticipated. In that case the anticipated attack must be imminent. In the case of *Colin v. Chisam*,[4] the Court of Appeal quoted with approval the judgement of Lord Justice Norman in the case of *Owens v. HM Advocate*:[5]

"In our opinion self-defence is made out when it is established to the satisfaction of the jury that the panel believed that he was in imminent danger and that he held that belief on reasonable grounds. Grounds for such belief may exist though they are founded on a genuine mistake of fact."

These two cases evidently suggest the existence of actual threat and danger and that that threat must also be imminent before one can exercise his or her right of self-defence. In the absence of such a pressing situation, it is highly unlikely that the defendant will be successful in pleading self-defence. Thus the nature of the circumstances in which the battered woman kills her partner makes the defence of self-defence prima facie improbable.

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3 [1972] NI 13, CA.

4 [1963] 47 Cr. App. R. 130.

5 (1946) S.C. (J) 119.

5.2.1 The meaning of "threatened attack" in the requirement of imminence

A case relevant to this issue is the case of *Gaynor Oatridge*.[6] The accused in this case had a battering relationship with the deceased (her co-habitee). It was accepted in the trial that their relationship seems always to have been stormy. There was ample evidence from other witnesses besides the appellant that there had been several instances when the deceased had struck her. At the time of the killing, the appellant was being throttled by the deceased. Her throat was seized and squeezed to the extent that she had difficulty in breathing. The appellant stabbed him in the belief that at that point her life was in immediate peril. The trial court rejected the plea of self-defence on the ground that the defensive act was not proportionate to the attack. In the Court of Criminal Appeal, the trial court's decision was quashed. The trial judge was held to have misdirected the jury on the point of the appellant's belief in her need to defend herself.

The importance of this case lies in the judgement of Mustill L.J. in the Court of Appeal. In his attempt to summarise the law of self-defence drawn from the case of *Gladstone Williams*[7] as well as the case of *R. v. Beckford*[8], he laid down the following propositions:

"In many cases of self-defence the following questions must be asked: (1) Was the defendant under actual or threatened attack by the victim? (2) If yes, did the defendant act to defend himself against this attack? (3) If yes, was his response commensurate with the degree of danger created by the attack?"

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6 (1992) 94 Cr. App. R. 367.

7 (1984) 78 Cr. App. R. 276.

8 (1987) 85 Cr. App. R. 378.

It is constructive to examine question number (1) in this proposition, particularly in relation to the use of the words "actual" or "threatened" attack. The literal meaning of the term "threatened attack" seems to suggest that the accused self-defence claim could be entertained even in a case where the attack was not in the form of an "actual attack". At this point it is interesting to know what the court means by the word "threatened attack" itself? Does it mean: 1) as a result of the battering relationship, the accused believed that her life has always been in immediate peril and therefore, her act of killing is justified, whatever the prevailing circumstances? Or, does it mean: 2) that a "threatened attack" is confined to a situation where the deceased has already acted violently, but it is not clear whether the violent act really imminently threatens the appellant's life at the time when she delivers the fatal blow.

If "threatened attack" is understood as having this second meaning, then this authority could not support the battered woman's case. However, if it (the word "threatened attack") is understood in the first sense, there is a possibility that a battered woman killing in self-defence could rely on this authority to justify her self defensive act. This point is now discussed in detail.

An actual attack could be understood as an attack which is actually happening, physically present and on the way to cause the accused severe injury. Threatened attack, on the other hand, could be construed in two ways: firstly, it could be understood as an attack which is likely to occur at any time during the battering relationship as a result of the threat made by the batterer. For example, as a result of one battering incident, the accused is threatened that at some future time she will be beaten more seriously or she will be killed. No violent act on the part of the accused has yet happened.

Secondly, a situation may arise in which, in one incident, the batterer has already been acting violently but the life of the accused itself is not really in serious danger. For example, as a result of some misunderstanding with the accused, the male partner starts to behave aggressively, damaging and destroying things in the house. However, even though he has already acted aggressively, there is no clear indication that he will end up threatening the life of the accused or causing her serious injury. It could be possible that he might stop by not hurting her, it could also be possible that he will seriously injure her. The question is whether would it be justifiable for someone to use force in self-defence in that particular situation? The Australian case of *R. v. Lane*[9] may clarify the point. The facts in this case showed that the deceased had been acting violently in the accused's house. Before the incident, he had been drinking heavily and that he had consumed a quantity of Mogadon tablets. It was accepted in court that the combination of these two led to the deceased being unreasonable and irrational. Much of the accused's furniture was destroyed by the deceased's violent acts. The court had accepted that before the killing, the deceased had already acted violently. However, in spite of this, the evidence did not conclusively suggest that the accused's life was at that time in imminent danger.

The trial court in *R. v. Lane* refused to leave self-defence to the jury, taking the view that, at the actual time of the killing, the accused could not have reasonably believed that an unlawful attack was being made or was about to be made on her. In other words, the trial judge saw no imminent danger to the life of the accused at the time the killing was committed. The Supreme Court of Victoria on the other hand, took the view that self-defence should have been open to the accused.

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9 [1983] 2 V.R. 449.

The importance of this case in the context of the present discussion lies in the fact that it supported the presumption that in a case where the violent act of the deceased has not yet directly threatened the accused's life, he or she nevertheless could rightly consider himself or herself to be in imminent danger and would be justified in using force in self-defence.

The Court of Appeal in *Gaynor Oatridge*[10] did not, however, elaborate on this issue, namely the meaning of "threatened attack" as mentioned in its proposition. The reason is probably that the court's primary concern was the proportionality of the accused's act in her defence. For that matter the court's main consideration was whether the appellant's defensive act was proportionate to the attack she confronted and not whether her life was in immediate danger at the time of the killing. The case thus was decided upon the requirement of proportionality defence rather than on the test of imminence.[11]

The judgement in *Gaynor Oatridge* further said:

"(1a) Even if the defendant was not in fact under actual or threatened attack, did he nevertheless honestly believed that he was? If this question is answered in the affirmative (or, more correctly, the prosecution does not establish that it should be answered in the negative) then the third question must be modified, so as to read:

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10 *Supra*, fn. 6.

11 Coincidentally, the judgement of the Supreme Court of Victoria also relied on the same approach as that taken in *Gaynor Oatridge*. Murphy J. in delivering the majority judgement stated: "In the present case I do not think that the applicant had to wait until the deceased was in the act of committing mayhem before he took physical steps to prevent the deceased doing so. The real question in the case, as I see it, may have been whether the jury were satisfied beyond reasonable doubt that the steps which the applicant took to protect himself were not reasonably proportionate to the danger which the applicant believed he faced: see Mason J. in *Viro. v. R.* (1978) 141 C.L.R. 88, at p. 147." *R. v. Lane*, *supra*, fn. 9 at p. 456.

(3a) Was the response commensurate with the degree of risk which the defendant believed to be created by the attack under which he believed himself to be?"

This proposition may be read as meaning: even if there was no actual threatening attack, if the accused - in the context of this discussion the battered woman accused - honestly believed that the threat had always existed, she would be allowed to make necessary step for self-defence even to the extend of killing her partner. The only qualification would thus relate to the test of proportionality in self-defence. In a case where the jury is satisfied that the accused's purported defensive act is proportionate to the attack which she believed to have seriously threatened her life, she would be protected under the defence of self-defence.

This is an ambitious interpretation of the Court of Appeal's propositions in *Gaynor Oatridge*. It has to be said that the case discussed did not in any instance refer to the problem of the battered woman syndrome. Neither are the propositions intended as a guideline for battered woman pleading self-defence. Should it be applied in this context, though, the decision could be an interesting authority in favour of the battered woman.

In Australia, the first proposition in *Viro v. The Queen*[12] required the accused to have reasonably believed that an unlawful attack which threatened him with death or serious bodily harm "was being or about to be made".[13] This appears to mean that the accused will only be allowed to rely on the defence if the attack is imminent and immediate. The defence against an anticipated attack will not be allowed. Therefore,

12 (1978) 141 C.L.R. 88.

13 Mason C.J. stipulated in his proposition:
1 (a) "It is for the jury first to consider whether when the accused killed the deceased the accused reasonably believed that an unlawful attack which threatened him with death or serious bodily harm was being or was about to be made upon him."
Viro v The Queen, ibid., at p. 146-147.

a person cannot rely on the defence if he has acted out of fear of some future (i.e. not presently existing) violence. In this respect, it is correct to say that the accused must have believed the threatened danger to be present and pressing before the defence will operate.

This strict rule laid down by the High Court was nevertheless interpreted quite loosely in the case of *Morgan v. Colman.*[14] The South Australian Court of Criminal Appeal in an attempt to restate the *Viro* propositions included the following comment:

"A person who, according to the circumstances as he understands them, genuinely believes that he is threatened with an attack, is not obliged to wait until the attack begins. A person so threatened may use reasonable measures to make the situation safe, and he does not act unlawfully merely because he forestalls or tries to forestall the attack before it has begun."[15]

The subsequent case of *R. v. Lane*[16] is important in that it tested the dictâ of the judge in *Morgan v. Colman.*[17] The facts of the case were that the accused hit the deceased with a bottle, thus fracturing his skull and killing him. The act of killing was committed at the time when the deceased was destroying the accused's property in his own house. It was not clear if the deceased had in fact made a threat to the accused's life. Murphy J. expressed the following opinion in his judgement:

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14 [1981] 27 S.A.S.R. 334.

15 *Ibid.*, at p. 337.

16 *Supra*, fn. 9 at p. 449.

17 *Supra*, fn. 14.

"If a person is, in his own home, placed in constant danger of serious bodily harm by another, I do not understand the law to be that he is only entitled to rely upon the plea of self-defence (should he kill the assailant and be charged with murder) if the killing was performed whilst an actual physical onslaught on the accused was ensuing or immediately threatened."[18]

This judgement seems to allow self-defence even when an actual threat did not exist. The approach taken in this judgement is perhaps due to the fact that the deceased was behaving menacingly in the accused's own house. It is doubtful whether the court would have decided the same way if the killing had taken place elsewhere.

The authorities discussed above, especially the cases of *Morgan v. Colman* and *R. v. Lane*, purported to allow self-defence even in a case where the life and bodily integrity of the accused is not in immediate peril. Nevertheless, returning to the battered woman's case, could these authorities strengthen a plea of self-defence in such circumstances? It seems unlikely. The primary reason is the fact that even though in both cases (the battered woman and the two cases discussed above) the life of the accused was not in immediate peril, there is a substantial difference between the two sorts of case. In *Morgan v. Colman*, despite the fact that the deceased's act has not yet caused the accused an immediate threat to his life, he had already been violent in the house and destroyed the accused's property. In contrast to the case of a battered woman, the killing takes place during a lull in the violence.

It has to be said that the traditional elements of self-defence give no room to a battered woman in her plea of self-defence. The decision of *Morgan v. Colman* in Australia arguably extends the imminence requirement to a situation where an actual

18 *Ibid.*, at p. 456.

threat did not exist at the time of the killing. However, unless there is a more specific judgement to that effect, this decision is inadequate as a comprehensive authority to justify the battered woman's killing.

5.3 THE "BATTERED WOMAN SYNDROME"

It is apparent that the essence of a battered woman case is that the threat or danger apprehended, though arguably existing at some time, was not actually present at the time of the killing. It appears that the circumstances of a battered woman case do not exactly fit the traditional model of self-defence. But this does not mean that the defence of self-defence can never be pleaded in court. Recent developments in the law of self-defence seem to allow a battered woman accused to plead self-defence. This may be done by introducing evidence of "battered woman syndrome" to convince the jury that her case does in fact contain all the requisite elements of self-defence.

5.3.1 What is "battered woman syndrome"?

The theory of battered woman syndrome was developed substantially by the work of an American psychologist, Lenore Walker.[19] Her aim appears to have been to dispel myths and misconceptions about domestic violence and thereby to help to establish the reasonableness of homicide by battered woman. But who is the battered woman? A battered woman has been defined by Walker as any woman "18 years of age or over, who is or has been in an intimate relationship with a man who repeatedly subjects or subjected her to forceful physical and/or psychological abuse."[20] The battered woman syndrome consists of two elements: the "cycle theory" and the theory of "learned helplessness."

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19 The theory of the battered woman syndrome was first developed in her work, "*The Battered Woman*", (Harper and Row ,1979). The theory was then reorganised in her book, "*The Battered Woman Syndrome*", (Springer, 1984). These two books are now widely referred to in many discussions on the battered woman syndrome.

20 L. Walker, "*The Battered Woman Syndrome*", *ibid.*, at p. 203.

5.3.2 The "cycle theory" in the definition of the battered woman syndrome

This theory postulates that male violence against women partners typically follows a three-phase pattern.

a. Tension-building phase

This is a period of tension heightening caused by the man's argumentativeness, during which the woman attempts various unsuccessful pacifying strategies. The tension-building phase of the battering cycle is the longest, with the initial stages lasting up to ten years. The batterer may initiate minor skirmishes, either physical or verbal, while the woman works to keep the peace and avoid the inevitable and ongoing escalation of the violence. The woman at first attempts to calm the batterer and reduce his anger but her efforts meet with limited success. She will then avoid any argument with the batterer in the hope that the batterer could be brought back to normal and also with the hope that she will not unnecessarily anger him and set off an explosion. The batterer on the other hand, despite the efforts by the woman to avoid arguments, behaves oppressively towards her. The situation between the two partners will be tense and unbearable. However, even though their relationship is so tense, there is no physical assault or attack by the male partner at this stage.

b. The acute battering incident

The tension building phase ends when the man erupts into a rage at some small trigger and acutely batters the woman. This phase is the shortest phase of the cycle, typically lasting between a couple of hours and a day. This is the period where the batterer, the male partner, unleashes all of the anger and tension accumulated during the tension building phase. The batterer starts to abuse the woman practically in any way he likes. This include beating, sexual abuse, harassment and any other sorts of abuse that satisfy him. Apart from releasing his anger, the reason for the battering could also be in the batterer's mind, a "lesson" to his female partner. It could also be that the batterer intends to show off his dominance in the relationship. It will only stop when he feels that his anger has been unleashed by the battering.

c. The loving contrition phase

Once the battering incident stops the batterer, perhaps after he managed to calm himself down and return to normal, may become apologetic and remorseful. The guilt-ridden batterer pleads forgiveness for what he had done and confesses his mistake. He may promise the woman not to lose his self control again and he may also promise to seek professional help to become a better husband or a better partner. The woman, amazingly, accepts the pledge and helps to build a new relationship, forgetting the bitterness of her battering experience.

Eventually, however, the cycle returns to phase one and the tension building begins again. As the relationship progresses over time, this phase becomes shorter and less conciliatory and the tension building phase becomes more dominant. When

the same process recurs, the female partner is said to be suffering from the battered woman syndrome.[21]

The acceptance of this "cycle theory" in a case where the battered woman pleads self-defence is of vital importance. As the facts of the incident show, the killing occurs during a period of relative calm and there is no actual physical threat that could suggest that she should exercise force in self-defence. Nevertheless, because of this cycle theory, she believes that at any time the man could be violent and at any time her life could be in great danger. The behaviour of the man always presents her with a threat of imminent harm. So what the accused is trying to establish is that, even though her act if judged strictly according to the traditional self-defence criteria, would not fit the defence, she has nevertheless acted honestly and reasonably in her use of force. If this is accepted, the requirements of imminence and reasonable belief no longer pose as obstacle to the plea.

5.3.3 The theory of "learned helplessness"

The theory of "learned helplessness" is derived from experiments in which dogs were tortured with electric shocks.[22] After repeated unsuccessful attempts at escape, they become increasingly passive and "learned" helplessness so that they

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21 L. Walker, explains: "A woman who is repeatedly subjected to any forceful physical or psychological behaviour by a man in order to coerce her to do something he wants her to do without any concern for her rights. Battered woman include wives or women in any form of intimate relationships with men. Furthermore, in order to be classified as a battered woman, the couple must go through the battering cycle at least twice. Any woman may find herself in an abusive relationship with a man once. If it occurs for the second time, and she remains in the situation, she is defined as a battered woman." L. Walker, "*The Battered Woman Syndrome*", *supra*, fn. 19.

22 This experiment was conducted by Martin Seligman and his colleagues. Seligman generalised this phenomenon to depression in humans. The finding of this experiment was adopted by Lenore Walker in her theory of learned helplessness. See L. Walker, "*The Battered Woman Syndrome*", *ibid.*, at p. 86.

later spurned proffered chances to escape.[23] It is suggested that the same thing happens to the battered woman - after repeatedly being battered, she may learn not to retaliate and to obey and accept.

The battered woman develops low self-esteem and becoming self-blaming. She becomes unable to anticipate the reaction of her partner in their daily relations. She cannot anticipate how the batterer will respond to any word or action on her part, and so she feels little control over his anger. Because the battered woman is unable to predict the effect her actions might have on her battering spouse, she eventually learns that she has no control over the situation and no escape from the pain; reacting with passivity becomes her best defence.

This psychological theory of learned helplessness helps to explain the incapacity of the battered woman to leave the abusive relationship. This is also of great importance as the traditional law on self-defence judges the reasonableness of the accused's act according to the way in which the accused has behaved. It is well accepted that the traditional self-defence concept requires the accused, if possible, to avoid the killing. The accused's effort to disengage and to flee in avoiding the worst is necessary in the determination of the reasonableness of her act.[24]

Now, to escape from the battering relationship in this case is arguably the more sensible alternative to the killing. The accused could be asked to explain why

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23 D.Nicolson and R. Sanghvi, "*Battered Women and Provocation: The Implications of R. v. Ahluwalia*", (1993) Crim. L. R. 728 at p.733.

24 The attitude of the law towards the duty to retreat reflects the tension underlying self-defence doctrine generally. It has been desired that an individual should be encouraged to retreat in order to avoid injury to himself or herself, or the attacker. At the same time, one should not be required to adopt a cowardly or humiliating posture. The result of *Palmer v. R.* [1971] 1All ER 1077, concluded that, duty to retreat should not be the deciding factor in accepting the accused's plea of self-defence. It, however, goes to show the reasonableness of the accused defensive act.

she did not try to leave the relationship when she was under "constant state of fear" or, why she did not try to seek help from outside. At this point, Walker's psychological theory of learned helplessness becomes an appropriate explanation.

The "cycle theory" and the theory of "learned helplessness" constitute the main ingredients in Walker's theory of the "battered woman syndrome". In a case where they are satisfied - they would help to explain the reasonableness of the accused's self defensive claim.

5.3.4 Criticisms of the theory of the battered woman syndrome

Despite the fact that Walker's theory of the battered woman syndrome is the most comprehensive and widely accepted theory in this area,[25] it is still far from perfect. As well as criticism of the theory itself, there has also been criticism of its proponent, Lenore Walker. Walker's involvement in the case of *State v. Martin*[26] in favour of the accused was heavily criticised. In this case, the accused separated from her husband in September 1980, after a violent five year marriage. The accused heard that her husband intended to blow up her house for the insurance money, and she feared this would be done while she was in the house. The accused, in her attempt to stop this plan, hired another person, Bratcher, to kill the husband. On December 5, 1980, after the deceased came to the house to sign some papers, Bratcher emerged from his basement hiding place and shot the husband in the neck. The accused asked him to fire a second shot, as she thought that this was necessary to kill the deceased.

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25 One commentator described L. Walker as the pioneer of the research on battered woman. L. Stuesser, "*The "Defence" of "Battered Woman Syndrome" in Canada.*" (1990) 19 Manitoba L.J. 195 at 197.

26 666 S.W.2d 895 (Mo.Ct.App.1984).

The accused was convicted of murder. She appealed her conviction on the ground, among others, that the trial court erred in refusing to admit evidence on the topic of the battered woman syndrome. In the Appellate Court the accused contended that as a result of repeated beatings, she had reasonably believed that she was in imminent danger of death or serious bodily harm. This argument was rejected by the Appellate Court, which stated that "the evidence here falls woefully short of establishing an issue of justifiable self defence."[27]

The main point of criticism was directed on the willingness of a psychologist, expert witness, in this case Walker, to give her evidence in support of the accused's claim. On the basis of her research, she had concluded that the primary reason to resort to killing is because that there is no other practical alternative for her to get out of her agony. She said: "Although our data indicate the woman kill their abusers for different reasons, they all resorted to using such violence as their last attempt at protecting themselves from further physical and mental harm.. . . . .They don't want the batterer to die, but rather, they just want him to stop hurting them."[28] In *Martin's* case however, it is difficult to see how a woman hiring another person for the specific purpose of killing her husband could be described as, "not wanting to see the husband die"- as claimed by Walker's theory. On the contrary, one could argue that the killing involved the highest degree of culpability if, as stated in court, the wife herself ordered the killer to finish off her husband's life at the time when the first shot did not quite did so. The fact that she gave her testimony in favour of the accused in this case contradicts her own theory.

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27 D. L. Faigman, "*The Battered Woman Syndrome and Self Defense: A Legal and Empirical Dissent*", (1986) 72 Virginia Law Rev. 619 at p. 632.

28 L. Walker, "*The Battered Woman Syndrome*", *supra*, fn. 19 at p. 41.

As in other cases, the accused could be completely acquitted in the event of being able to plead self-defence successfully. In this case, she sought to rely on the defence on the ground that she was constantly abused and that that abusive and violent behaviour of her husband led her reasonably to believe that her life was in imminent danger. It was for this reason that expert testimony in respect of the battered woman syndrome was called for.

From the facts of the case, one wonders whether any court could really accept the claim of self-defence. The claim of self-defence would deserve to be taken into account if the killing took place while the accused was being attacked or abused by her husband. It could also be raised if the facts showed that the accused had stabbed or shot the husband herself even at the time when there was no actual physical threat from the deceased; in such circumstances the introduction of the battered woman syndrome in the trial would be appropriate. However neither of these two factors was present. The accused's claim of self-defence was made after she had hired another person to kill her husband on her behalf. On this point alone, her wicked intention was evident, and any argument that she was reasonable in her act seems utterly unacceptable.

The flaw of the claim would be more apparent if the issue is discussed in the context of the theory of justification and excuse in self-defence. Legal theorists have mostly concluded that the defence of self-defence falls under the theory of justification - which means that the accused herself or himself is tolerated or condoned for what he had done even though the act, if committed under ordinary circumstances, is wrongful and punishable. It is commented that when a person is justified in doing certain act in defence of his or her life, it means that she had the

legal right to do what he or she had done.[29] Now, returning to the case under discussion, should the accused's claim of self-defence be accepted on the ground of the doctrine of battered woman syndrome, theoretically, her act is one that she had the right to do in the defence of her own life against her husband. The question is, would it really be acceptable for her to hire another person specifically to kill her husband, and then claimed that the pressure of living in a battering relationship forced her to do so? The Court of Appeal in the case of *Martin* had therefore very rightly rejected the plea of self-defence and ignored the evidence on battered woman syndrome.

It is, however, regrettable that the accused's claim was supported by psychological evidence. The expert's involvement in favour of the accused in this case rendered her credibility questionable. It is precisely this willingness of experts to take the stand in extreme cases that reinforces the perception among lawyers that psychologists and psychiatrists are simply "hired guns."[30]

Lenore Walker's theory of battered woman syndrome also attracted criticism among lawyers in respect of the design of the research that lay behind it. These methodological and interpretive flaws call into question the validity of cycle theory. One of the most comprehensive criticism comes from David L. Faigman in his evaluation of the research:[31]

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29 It was explained: "The basis of a claim of justification is that it speaks to the act, a claim of excuse to whether the actor is properly regarded as responsible for it. A claim of justification involves saying. "I am responsible for what was done although as invasion of an interest of another which is generally protected by the criminal law, was done in circumstances which gave me legal right to do it." P. Allridge, "*The Coherence of Defences*", 1983 Crim. L. R. 665 at p. 665.

30 D. L. Faigman, *supra*, fn. 27 at p. 633.

31 *Ibid.*

1. The first point of his criticism focuses on the fact that the research used leading questions in interviews with subjects; this renders the subjects' response suspect. In many of the studies involved, the hypothesis of the experimenters is not difficult to discern, and the subject may simply supply the researchers with what they want to hear. A good and reliable research project should not permit the hypotheses to become as obvious to her subjects as Walker did.

2. The second criticism dwells on the manner in which the researcher derives her evidence of tension building and/or loving contrition. This evidence was gathered not from the subjects' responses directly, but derived instead from the interviewers' evaluations of those responses. This, as the criticism explains, made the research susceptible to the problem of the expectation of the experimenter.

3. The third defect was said to be the most legally significant flaw in Walker's development of the cycle theory. This is concerned with her failure to place the three phases of the cycle within any sort of time frame. The determination of each and every phase of the cycle is vitally important so as not to allow an overlap between each phase. For example, it was commented that, a tension building phase of 15 minutes could not be considered long enough for an accused to claim a "constant state of fear." By contrast, tension building that lasts several days and always culminates in a severe beating assumes tremendous legal significance in a self-defence case.

The theory also did not indicate whether the period of normality did occur in between the loving contrition phase and the tension building phase. If it exists, then there should be four phases to constitute the battering cycle rather than the three suggested. The theory made no mention of this possibility.

4. Supporters of battered woman syndrome testimony have understood Walker's research to show that "during the first two stages, particularly in the second one, the woman is consumed by fear and feels powerless to do anything to end the violence." The criticism, however, says that this conclusion in actual fact receives little support from the research itself. A considerable number of the women subjects were not sure when asked whether they really thought that their husband or partner could or would kill them. Though there were some who did have that feeling, many still did not think it would happen. This fact loosely supported her claim that the battered woman really suffered from a constant fear of death as a result of the battering relationship.

5. Walker concluded that there must exist three distinct behavioural cycles in the progress of the battered woman syndrome. Each and every phase occurs separately and in the sequence, she deduced: tension building, leading to the acute battering incident, followed by loving contrition - in a single relationship. However, her own data was said not to support her conclusion. The main difficulty of her theory is to find any subject to fulfill all the three phases in one relationship. In the data which she referred to in her conclusion it is shown that there were many instances where a woman had not completely fulfilled all the three cycles in one relationship but was still said to be suffering from the syndrome. This suggests that a person may not have to undergo all the three phases to claim battered woman syndrome. Her final conclusion, however, stressed importance of fulfilling the three phases. At this point her research data contradicts her own theory. A good and reliable theory should not have these defects.

In addition to this difficulty of fulfilling the three phases, what is not clear in the research is whether the recurrence of the battering relationship needs to fulfill all the three stages of the theory. What would be the effect if, after the loving contrition

period the parties suddenly became involved again in a tension building phase? After a period of time, however, the tension cools down and the couple manages to settle the dispute. The wife starts to put her trust in the husband and even more than that, forgets the past experience. The tension building then recurs over a period and in a serious manner. Now, if the wife at the end kills the husband, can she be said to be suffering from the battered woman syndrome as it is defined in Walker's theory? Despite the fact that she had been battered once, could she be said as having reasonably feared of her life if the only threat that is likely to follow is no more than a "tension building phase", no matter how serious and how frequent it happens? Walker does not clarify this and indeed it is not also reasonable to expect clarification in detail. However, this does tend to show the frailty of the theory.

In addition to these five methodological flaws, difficulty is also encountered the cycle theory to cases in which a woman has killed her partner. The law of self-defence stands on the principle that only a reasonable amount of force is allowed in repelling the threatened attack or danger. A corollary of this principle is that the defender may employ deadly force only in response to the aggressor's threat of deadly force. In the context of the present discussion on the cycle theory in battered woman syndrome, it does not provide the jury with any insights into the precise nature of the harm a woman perceives at the time she strikes out at the batterer, whereas, as an underlying precondition in the law of self-defence, a deadly force could only be used to repel a similarly deadly attack.

The cycle theory presupposes that the woman believes that her life and bodily integrity have always been in imminent danger, nevertheless the true fact is that the nature of the danger she believes herself to be exposed to may not be as serious as she might have thought. For example, after undergoing the three stages as

suggested in the theory, the woman entered into a period of calm with her husband. Not long after a period of calm, however, they again became involved in a quarrel. By now, the cycle theory is recurring and that the woman could be within the definition of battered woman syndrome. However, even though she may be reasonable in expecting another battering incident from her husband, the nature of the "assault" could never be precisely determined. There is a possibility that she may be severely beaten to the extend of causing her serious bodily injury, but it is equally possible that she may not suffer any serious attack. For the theory to be strongly substantiated, though, it must be a matter of certainty that the attack perceived by the accused be murderous or capable of inflicting upon her grievous bodily harm.

The other major defect of the theory is that it seems to deny completely the fact that human beings are by our very nature susceptible to changes. A caring and lovely husband could one day be violent for very specific reasons and, similarly, a violent husband, one who one does not show many signs of being a good partner, may on occasion also be very responsible and protective. Therefore, one could legitimately argue that when a husband happens to batter his wife once, it does not necessarily mean that in future she is again going to be the subject of the same brutality.

The theory also does not consider the reason why the husband should behave with such cruelty. It is possible, for example, the woman's behaviour contributes to the worsening of the family relationship. The theory seems not to give any consideration at all to this point. It could be said that Walker presumes that in any quarrel between the partners - which in her theory leading to the battering relationship - the blame will inevitably be laid at the door of the male partner. This is obviously bias and prejudice against the male partner.

Some consideration has also got to be given, if the theory is to be made reliable, to the character or personality of husband and of the partner who was killed. There are cases where the husband was indeed prone to violence and an irresponsible partner. There are also cases where the husband was a responsible partner without any history of violence, and there was nothing else to suggest that he might be a threat to anybody let alone to his own wife. In a case where this kind of husband suddenly becomes violent in the family, it would be possible that his behaviour has been affected by other outside factors. It might be possible that the wife herself has contributed to the situation. Therefore, not only that the circumstances affecting the wife's act is to be considered, the reasons leading to the husband's violent behaviour should also be assessed. Without such a full investigation the complete picture of the killing and the causes behind it may not emerge.

5.3.5 The theory of "learned helplessness": some observations

The adaptation of the theory of learned helplessness which was originally based on the finding of Martin Seligman's research experiment on dogs,[32] was also considered to suffer from both theoretical inconsistency and inadequate research methodology. The theory explains that when dogs were subjected to repeated electrical shocks, they would in the end "learn" that they were helpless. When subsequently placed in an escapable situation, the dogs failed to escape. The researcher then concluded that as a result of the torture, it would be extremely difficult, and in some cases impossible, to retrain the dogs to exercise control over their environment.

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32 *Supra*, fn. 22.

A battered woman who have been the subject of repeated abuse and torture would in the end be passive and unable to act. This would mean, from a theoretical perspective, one would predict that when a battered woman was suffering from learned helplessness she would not be able to control over her environment: certainly, one would not envisage such decisive steps as the killing of the batterer. The act of killing the batterer showed that, on the contrary, she had full control of the environment and that certainly she had not been completely helpless and passive as the theory itself suggested. It was suggested then that for a woman to realise that she alone has to protect herself is "antithetical" to the notion that she is unable to assert control over her environment and this contradicts the basic insight of the theory of learned helplessness.[33]

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33 D. L. Faigman, *supra*, fn. 27 at p. 641.

B. THE THEORY OF THE BATTERED WOMAN SYNDROME IN THE COURTS

5.4 BATTERED WOMAN SYNDROME IN THE CANADIAN COURTS: *R. v. LAVALLEE*

The decision of the Canadian Supreme Court in the case of *R. v. Lavallee*[34] is significant in so far as the application of the battered woman syndrome in the courts is concerned. The case is now discussed in full.

The appellant had been living with the deceased for some three to four years. On the night in question, they invited some guests for a party in their own home. It was explained in court that when the party was over, they had an argument which later turned out to be fairly serious. The appellant in her statement to the police, which was made during the night of the killing, explained that they started to quarrel after most of the guests had left the house. The deceased seized her by the left hand and also hit her, causing a bruise on her face.[35] He then went to the other room, loaded his gun and gave it to the deceased. In her police statement, the appellant claimed that the deceased said "wait till everybody leaves, you'll get it then" and then threatened the appellant to the effect that "either you kill me or I'll get you". She then shot him in the back of the head, apparently as he was leaving the room, and killed him almost immediately.

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34 [1990] 1 S.C.R 852

35 The coroner who performed an autopsy on the deceased was shown pictures of the appellant, and he testified that it was "entirely possible" that bruises on the deceased's left hand were occasioned by an assault on the appellant. *R. v. Lavallee*, *ibid.*, at p. 858.

It was apparent from the appellant's statement that throughout the relationship, she had been continuously harassed, threatened and sometimes beaten seriously. One of the attending physicians testified that he had treated the appellant several time between 1983 and 1986 when the appellant went to hospital for treatment for injuries including severe bruises, a fractured nose, multiple contusions and a black eye. This accordingly affected her profoundly and when a situation similar to that which arose on the night of the killing, the appellant really believed that she was to be seriously wounded if not killed.

It is to be noted that all the witnesses testifying in the case had spoken in support of the appellant's claim that she had been living in a volatile relationship with the deceased. A friend of the deceased testified that he had witnessed several fights between the appellant and the deceased and that he had seen the appellant pointed a gun at the deceased twice and threatened to kill him if he ever touched her again. He also testified that on one occasion he had seen the appellant with a black eye and doubted that it was the result of an accident as she and the deceased had suggested at that time.

Another witness said that on the night of the killing the appellant was chased by the deceased and that she pleaded with the deceased to leave her alone. It was testified that the appellant sought his protection by trying to hide behind him.

Further testimony was provided by the arresting officer who said that en route to the police station the appellant made various comments in the police car, including "he said if I didn't kill him first he would kill me. I hope he lives. I really love him." This testimony of the arresting officer was significant in that it supported the

appellant's claim in the police report that her intention was not malicious but merely to save her own life from possible murderous assault from the deceased.

On top of this evidence given in the appellant's favour, her claim of self-defence was supported strongly by an expert witness - a psychiatrist with extensive professional experience in the treatment of battered wives. The substance of this opinion was that the appellant had been terrorised by the deceased to the point of feeling trapped, vulnerable, worthless and unable to escape the relationship despite the violence. This testimony strongly suggested that the psychological affect of the battering relationship, added with the incident prior to the killing on the night in question, led to an honest belief by the appellant that she would be killed.

In the trial court, Crown counsel challenged the testimony of the psychiatrist expert witness on two main grounds:

1. The jury was perfectly capable of deciding the issue on the admissible evidence and that expert evidence was therefore "unnecessary and superfluous".

2. The psychiatrist's comment that he had found the accused credible was "wholly improper" in light of her failure to testify as to the facts upon which Dr. Shane (the expert witness) based his opinion.

The trial court rejected these contentions. The psychiatrist's examination of the appellant was accepted and she was held to have suffered psychologically from a long period of battering, and that the killing had not been premeditated. Her plea of self- defence was thus accepted.

The Crown appealed to the Manitoba Court of Appeal. The main ground of appeal was the admissibility of the expert witness. The Crown prosecution insisted that a claim of self-defence should not be granted due to the fact that the requirements of self-defence had not, or could not be fulfilled and that the battered woman syndrome could not in any way support the appellant's claim of self-defence.

The majority opinion in the Manitoba Court of Appeal shared this concern over the admissibility of the expert witness's testimony. The main point of dissatisfaction was the fact that the appellant did not herself testify in the court. In addition, the expert witness based his opinion, in the main, on the unsworn police statement made by the appellant on the night of the killing and his lengthy interview with her sometime after the killing, and not on the evidence presented in court.[36] In the end result, the majority of the judges allowed the appeal and ordered a new trial.

The matter was subsequently taken to the Supreme Court of Canada. The main issues before the court were still that of the admissibility of an expert witness in a case where a woman killed her partner when she is not in immediate danger and also the significance of the theory of the battered woman syndrome.

The Supreme Court, through Wilson J., accepted that in a case where the accused had been continuously harassed by her husband, the psychological effect of the relationship has to be explained by an expert professional. References were made

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36 Philip J. in the Manitoba Court of Appeal said:
" . . . . In these circumstances, absent the evidence of Dr. Shane, it is unlikely that the jury, properly instructed, would have accepted the accused's plea of self-defence. The accused did not testify, and the foundation for her plea of self-defence was, in the main, her unsworn exculpatory evidence and the hearsay evidence related by Dr. Shane. Because Dr. Shane relied upon facts not in evidence, including those related to him in his lengthy interviews with the accused, the factual basis for his opinion should have been detailed in his evidence."
The judgement clearly proved the unreadiness of the Court of Appeal to accept the evidence not based on facts actually presented in the trial. *R. v. Lavallee*, *ibid.*, at p. 866.

to the case of *Alain Beland*[37] and *R. v. Abbey*[38] where in both cases the courts explained the circumstances where expert opinion may be necessary and also elaborated the function and the implications of an expert opinion.

In addition to the two cases referred to above, the court also cited with approval the decision of *State v. Kelly,*[39] where in its explanation on the value of expert testimony, the New Jersey Supreme Court said: "It is aimed at an area where the purported common knowledge of the jury may be very much mistaken, an area where juror's logic, drawn from their own experience, may lead to a wholly incorrect conclusion, an area where an expert knowledge would enable the jurors to disregard their prior conclusions as being common myths rather than common knowledge."[40] The court decided that expert evidence on the psychological effect of battering on wives and common law partners must be both relevant and necessary in the context of the case in hand.

As it appeared, the claim of self-defence could hardly be successful as the traditional requirements of self-defence had not been met - the deceased had not been physically violent during the time preceding the shooting and that there is no evidence that he did anything so as to put the life of the appellant in danger. The Supreme Court in dealing with the case, therefore, acknowledged the fact that the theory of battered woman syndrome, if accepted, would enable the appellant to succeed in her self-defence defence despite the absence of the fundamental requirement of "actual danger".

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37 [1987] 2 S.C.R. 389.

38 [1982] 2 S.C.R. 24.

39 478 A.2d 364 (N.J. 1984).

40 *R. v. Lavallee*, *supra*, fn. 34 at p. 873.

5.4.1 The battered woman syndrome and the self-defence requirement of reasonableness in *R. v. Lavallee*

Section 34 (2) of the Canadian Criminal Code provides:

"Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if

> (a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes, and
>
> (b) he believes on reasonable and probable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm."

This provision essentially requires an accused to be reasonable in respect of both believing an attack to be being made as well as in the manner of repelling this attack in defence of his or her life. We now turn to an analysis of this prerequisite as applied in the decision in *R. v. Lavallee*.

In the context of this provision, the question which needed to be decided is whether the shot fired in the night in question was realistically necessary at that particular moment in order to forestall the perceived threat? In other words, was the appellant under reasonable apprehension of death or grievous bodily harm from the deceased as he was walking out of the room? The second question is whether the appellant's use of force, i.e. the shooting, was reasonably necessary in that situation

which, had it not been so, it would not be possible for her to otherwise preserve herself from death or grievous bodily harm.

In both contexts the appellant needed to be reasonable; firstly, in her belief that her life is seriously in danger, and secondly, in her belief that the only way to safe herself is by way of killing the deceased. The issue which immediately came to the attention of the judges was that of the assessment of the appellant's reasonable belief. Should reasonableness here be interpreted according to an ordinary reasonable man test as it is widely understood or should there be a special consideration given to suit the circumstances of woman's case; which suggests a departure from the orthodoxy of the reasonableness test.

The objective reasonableness required in the Code, and also in provisions of self-defence in other system emphasises the male perception of danger. It could therefore be said that the requirement of reasonableness, as required in the law of self-defence, is postulated on the reaction of a hypothetical reasonable man presumed to be in the appellant's position. On this point the Supreme Court had a clear view.

Wilson J. in delivering the Supreme Court's judgement stated that in a case where a woman is subjected to continuous abuse, the law does not need to consider her act according to the ordinary reasonable man test. The question of '"practicality" and "justice" seems to be the main reasons for this approach: practicality in the sense that, to compare a woman's perception in a situation which could not be appreciated by a man is simply unacceptable and not sensible; justice in the sense that if it is done, there is a danger that a woman accused could be convicted as a result of the misapplication of the law. He suggested that in a situation where an accused has been the subject of continuous abuse, it would only be sensible if her reaction were to

be judged according to a criterion of the reasonable female person presumed to be in her position. Wilson J. stated:

"If it strains credulity to imagine what the "ordinary man" would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical "reasonable man"."[41]

Having decided on the correct use of the reasonableness test, the court moved on to decide the requirement of imminence in the law of self-defence. Again section 34 2 (a) and (b) of the criminal code was referred to. The court observed that section 34 2 (a) and (b) does not in actual fact envisage the attack as imminent. Nevertheless, a series of previously decided cases treated the imminence requirement as an important ingredient in the law of self-defence. Specific references were made to the case of *Reilly v. The Queen*,[42] *R. v. Bogue*[43] and *R. v. Baxter.*[44] In these cases, the Supreme Court approved an interpretation of imminence conjuring up an image of "an uplifted knife" or a pointed gun.

The court then considered whether a person threatened only by words or gesture, could view herself or himself as being already in imminent danger and therefore be allowed to proceed with whatever steps thought necessary in defence of the perceived threat? Or, should such a person seek assistance from others? On this

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41 *Ibid.*, at p. 874.

42 [1984] 2 S.C.R. 396.

43 (1976) 30 C.C.C. (2d) 403.

44 (1975) 33 C.R.N.S. 22.

matter, the Nova Scotia Court of Appeal's case of *R. v. Whynot*[45] was highlighted. The decision in that case asserted that it is inherently unreasonable to apprehend death or grievous bodily harm unless and until the physical assault is in progress. The decision in *R. v. Whynot* was too rigid and inflexible, and if followed strictly would leave the accused in this case with no chance of success in her plea of self-defence.

It has to be said that by mere looking at the facts of the case as explained in the court, based on the unsworn statement of the appellant made to the police, it would be reasonable to ask why she opted to shoot when she has other alternatives. Perhaps it would have been more sensible for her to flee to safety. Perhaps she could even seek police protection if she really thought that the threat made was to be carried out. In an ordinary case of self-defence, it seems highly unlikely that the accused could answer those questions satisfactorily to justify her self-defence claim, particularly if the judgement in the case of *R. v. Whynot* is applied.

The Supreme Court, however, had openly expressed its unwillingness to follow *R. v. Whynot*.[46] In its judgement, the theory of battered woman syndrome as explained by an expert evidence was regarded as highly necessary in deciding the reasonableness of the accused's act. At this point, therefore, the theory of battered woman syndrome from which the appellant allegedly been suffering became the deciding factor. It is upon this consideration that the case then proceeded.

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45 (1983) 9 C.C.C. 449. This case will be discussed in full later in this chapter.

46 Wilson J. in her judgement stated:
"The requirement imposed in *Whynot* that a battered woman wait until the physical assault is "underway" before her apprehensions can be validated in law would, in the words of an American court, be tantamount to sentencing her to 'murder by installment': *State v. Gallegos*, 719 P.2d 1268 (N.M. 1986), at p. 1271."
R. v. Lavallee, *supra*, fn. 34 at p. 883.

5.4.2 Walker's theory of the "battered woman syndrome" in *R. v. Lavallee*

Wilson J. in delivering the majority judgement expressed the court's recognition of the theory of battered woman syndrome advocated by Lenore Walker. The description of the accused's state of mind and the history of her relationship with the deceased conformed to the features of the syndrome propounded in the theory. With regard to the mental state of the appellant, Wilson J. observed:

"Given the relational context in which the violent occurs, the mental state of an accused at the critical moment she pulls the trigger cannot be understood except in terms of the cumulative effect of months or years of brutality."[47]

The implication of this statement is that in saying that the appellant's act can be understood only after considering her state of mind and taking into account the history of the relationship, the court suggest its readiness to allow an expert opinion explaining the appellant state of mind which, if acceptable, would help the jury to understand her perception to the situation while committing the killing. The "cumulative effect of months or years of brutality" in the relationship was in fact explained by a psychiatrist in the trial court which was also held to be desirable by the Supreme Court. The approach taken in the Supreme Court only confirms that the case was to be treated differently from other ordinary self-defence cases and that the jury could only understand the true situation after hearing an expert's clarification of the appellant's state of mind at the time of the killing.

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47 *Ibid.*, at p. 880.

5.4.3 The battered woman syndrome's cycle theory in *R. v. Lavallee*: some comments

The "cycle theory" derived from Walker's battered woman syndrome had been successfully explained in the trial court and accepted in the Supreme Court. The theory requires the battering incidents to occur at least twice in the relationship. The court quoted with approval the work of Dr. Walker: "Any woman may find herself in an abusive relationship with a man once. If it occurs a second time, and she remains in the situation, she is defined as a battered woman."[48]

Having said that, however, the judgement did not meticulously observe the three periods which constitute the cycle theory. The theory suggests that the violence frequently occurs within the context of a three phase cycle namely the "tension building phase", the "acute battering phase" and the period of calm which is known as "loving contrition" phase. During the third phase, as it was explained in the theory, the batterer would realise that he was at fault and would seek forgiveness and show remorse and kindness. Nevertheless, eventually the cycle begin once again and as soon as it starts for the second time, if the wife happens to kill the batterer, her claim of self-defence could be supported by the syndrome.

Now, the court was right to require the appellant to have experienced violence twice before she could be said to be suffering from the syndrome. However, it seems evident that whether or not she had undergone all the three phases as described and required in the original theory had not been fully observed.[49] All the three courts seemed not to be too particular on this issue. It was explained in the trial court that

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48 *R. v. Lavallee*, *ibid.*, at p. 880.

49 The court seems to have observed the first requirement that the battering relationship happened twice but the problem is that no serious observation seems to have been made as to whether the whole phases comprising the cycle theory need also to happen twice.

the appellant was frequently a victim of physical abuse between 1983-1986. However, the incidents leading to the beating and what happened immediately after it has not been observed. Should the cycle theory be fully applied and testified, it will be necessary that all the happenings required need to occur exactly and in the sequence laid down in the theory. Otherwise, the theory could not be applied and that the appellant is not a battered woman as intended in Walker's theory despite the fact that she had been the subject of continuous battering.

Another way to look at the issue involves taking Walker's cycle theory only as a general guideline. The three phases mentioned in the theory are not really meant to occur exactly in a sequence as described. It would suffice if the evidence show that the accused woman had been beaten from time to time. Whether after the beating, they fell into the "loving contrition phase", or before the beating there was a period of "tension heightening" will not affect the claim. And also prior to the second abusing incident, that is, in the period between the loving contrition and the second battering, there was a period of tension heightening was not also being emphasised. It seems that the main point in the eyes of the court is the repetition of the beating itself. This seems to be the way the theory of battered woman syndrome was viewed in the present case. If it is so, one could ask, what is the legal effect of the cycle theory? Should it be carefully examined in each battered woman claim or, should it not be. Certainly by virtue of the case under discussion, the issue had not been made clear. One could say, at least at this point of the theory, it needs more clarification. In the absence of any satisfactory explanation, the theory itself is defective and confusing.

5.4.4 The theory of "learned helplessness" in *R. v. Lavallee*

The court also agreed with the theory in that where an accused had been routinely abused, she had developed herself the skill that could accurately predict the occurrence of the violence and also she would be able to anticipate correctly the nature and the result of the attack. Thus, even though an ordinary reasonable person would not believe life and bodily integrity to be in serious danger merely by the kind of the threat received by the accused as in the present case, the accused, considering the history of her relationship with the deceased, would believe this.

Lenore Walker responds to the argument that the wife could have indeed avoided the killing by fleeing the relationship or seeking outside help by introducing what is known as "learned helplessness" theory. This notion of learned helplessness arises in the present case. Dr. Shane, who testified for the appellant argued that as a result of the sufferings she had become hopeless and had very low self esteem. She learned only to be obedient for that is the best way to avoid any serious argument that could lead to another battering incident.[50]

The nature of the relationship between the parties had evidently, as testified and accepted in the court by an expert, fitted the theory of battered woman syndrome. This would also mean that despite the fact that the appellant's behaviour did not fit squarely with the traditional requirement of self-defence, it could do so with the help of an expert witness to testify in her favour.

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50 Dr. Shane testified that one of the reasons that forced the accused to remain in the relationship is the fact that she had been beaten very seriously on many occasions preceding the killing. "One is that the spouse gets beaten so badly-so badly- that he or she loses the motivation to react and becomes hopeless and becomes powerless. . . . . . It becomes just helpless and lies there in an amotivational state, if you will, where it feels there's no power and there's no energy to do anything."
R. v. Lavallee, *supra*, fn. 34 at p. 884.

The judgement in the Supreme Court rigorously emphasised the importance of expert testimony in a case where the battered wife kills her spouse. In the absence of such testimony, the credibility and integrity of the court itself would be in question. Wilson J. therefore laid down the primary function of expert evidence in cases involving a battered woman accused in the following terms:

1. Expert testimony is admissible to assist the fact-finder in drawing inferences in areas where the expert has relevant knowledge or experience beyond that of the lay person.

2. It is difficult to comprehend the battered wife syndrome. It is commonly thought that battered women are not really beaten as badly as they claim, otherwise they would have left the relationship. Alternatively, some believe that women enjoy being beaten, that they have a masochist strain in them. Each of these stereotypes may adversely affect consideration of a battered woman's claim to have acted in self defence in killing her mate.

3. Expert evidence can assist the jury in dispelling these myths.

4. Expert testimony relating to the ability of an accused to perceive danger from her mate may go to the issue of whether she "reasonably apprehended" death or grievous bodily harm on a particular occasion.

5. Expert testimony pertaining to why an accused remained in the battering relationship may be relevant in assessing the nature and extent of the alleged abuse.

6. By providing an explanation as to why an accused did not flee when she perceived her life to be in danger, expert testimony may also assist the jury in assessing the reasonableness of her belief that killing her batterer was the only way to save her own life.[51]

Having relied heavily on expert opinion, the Supreme Court finally overruled the majority judgement in the Court of Appeal and reinstated the trial court's decision. The appellant's plea of self-defence was granted with the assistance of an expert opinion and accordingly the theory of battered woman syndrome justified an act which would otherwise unjustified.

5.4.5 *R. v. Lavallee*: some comments

The importance of *R. v. Lavallee* rests on four factors:

1. The court admitted that in a case where a battered woman claims self-defence, her mental state needs to be clarified by an expert witness. By this, the court meant to say that, in some cases, the jury has to be assisted by an expert to appreciate the nature of the case. Without such detailed examination, the credibility of a judgement would be in question.

2. The battered woman's perception of the danger threatening her life and bodily integrity and the manner she exercises her defensive conduct have to be reasonable. However, the construction of reasonableness here is not a matter of stereotypical assumptions based on male experiences. It would be of a great injustice if a woman's behaviour were to be adjudged objectively by the standard of hypothetical man

51 *R. v. Lavallee*, *ibid.*, at p. 889 - 890.

presumed to be in her position. The reasonableness of the accused's act can only be justifiably assessed by a reasonable hypothetical woman put in her position. This accordingly introducing a new conception in the law of self-defence.[52]

3. For the first time, battered woman syndrome was successfully used to support an accused person's claim of self-defence. The main function of the syndrome is its role in explaining to the jury the physical and mental condition of the battered wife. As a result of this traumatic experience, such a woman's perception of danger could be different from that of others. And most importantly, what is reasonable to her could accordingly be different from others who did not suffer from the same bitter marital relation.

4. Fourthly, and most importantly, is the fact that the court is now prepared to allow self-defence even in a case where the traditional necessary elements constituting the defence are not present.

5.4.6 The application of section 34 of the Canadian Criminal Code in *R. v. Lavallee*

One point of criticism concerns the application of section 34 of the Canadian Criminal Code. The provision states:

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52 It was argued that the majority of murder cases involve male offenders which makes the defence of self-defence basically a paradigmatically male ideal model. The concept of reasonableness and proportionality through which reasonableness will be judged, is essentially for a male oriented concept. It is of this reason that homicides by women are rarely perceived as instances of self-defence.
A. McColgan, "*In Defence of Battered Woman Who kill*", (1993) 13 Oxford Journal of Legal Studies 508.

"Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if. . . . . "

The wording in this part of the provision suggested that self-defence could be claimed in a situation where he or she is unlawfully assaulted and that he caused the death or grievous bodily harm against the attacker "in repelling" the unlawful attack which was at that time underway. The word "in repelling the assault" here is crucial. It naturally suggests that the accused was in the process of defending himself from any kind of threat or attack which would cause her death or grievous bodily harm.

Subsection (a) of section 34 (2) further states that the killing is justifiable if at the time of its commission the accused was under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes. The subsection requires the accused to be reasonable in his apprehension of the danger. Thus in the light of section 34 (2) (a), an accused could rely on self-defence as described in this provision in a case where he is the subject of an unlawful assault and where in repelling that actual assault he reasonably apprehended that his life was seriously threatened.

Now, apart from the case where the accused's life was clearly in the hands of the assailant,[53] this subsection also seems to allow self-defence in a case where "an attack was already physically in progress, but, it has not yet directly threatened the life of the accused". In a case of such a nature, the only condition prescribed is the reasonableness of the accused's belief in the danger encountered. An example of this would be the case where an accused is confronted with a violent person who has been menacing people on the street. Let us assume that for some reason he is not able to

53 For example in a case where the accused had already been struck in her struggle to ward off the attack - as in that situation it will not be difficult to establish the reasonableness of her act.

flee and he uses force in what he thinks to be a defensive act. In the trial, the main issue would be whether his apprehension of the danger and also the manner in which he carried out the defensive act is reasonable. In considering this, all the circumstances surrounding the incident would have to be examined. In a case where the jury is satisfied that his defensive conduct is reasonably necessary, it seems likely that he could rely upon section 34 (2) (a) and be successful in his self-defence claim. This could be so despite the fact that the violence he confronted had not yet directed specifically at him.

Another example would be a case where there is a dispute between a couple. The male partner loses his temper and that starts to act violently but does not yet directly threaten the life of his partner. However, fearing that her life may be seriously threatened, she strikes him, causing his death. Surely the primary issue is how imminent is the danger, how reasonable is she in perceiving the threat to her life (which means that how reasonable is she in believing that despite the fact that the violence has not yet been directed to her, her life is already in danger) and whether the killing is the most appropriate and effective way to save her life. Again, as in the previous hypothetical case, the reasonableness of her perception of the danger would in the end be the decisive factor.

Section 34 (2) (a) thus enables self-defence to be involved in two situations:

1. In a case where there is a direct interference with bodily integrity.

2. It is likely that a person who has not yet been attacked, but, believes that he will be - because of the violent act of his supposed attacker - may also be protected by the section.

However, in the case of a battered woman, where an accused killed when there is no actual physical threat, and the killing is merely a result of her belief that she will at some point herself be killed or seriously injured, there can be no connection with the provision. The question then is: was Lavallee's claim of self-defence compatible with the requirements of section 34. The trial court as well as the Supreme Court did view the case in this perspective.

In the course of the judgement in *Lavallee*, the Supreme Court singled out two elements of the defence under section 34 (2) of the Code for particular scrutiny. The first is whether the appellant reasonably felt that her life was in immediate danger at the time when the deceased handed over to her the loaded gun and walked out of the room. The second related to the section 34 (2) (b) requirement as to the magnitude of the force used by the accused. No discussion was entered into regarding the suitability of the provision itself in the case in question. Had this issue been raised, there is a strong possibility that the case in question would not have satisfied the requirements laid down in the Code. The main reason is because Lavallee in her defence did not kill at the time when the threat was really imminent and that she was not at the time of the killing repelling any actual assault from the deceased. This apparently fails the "in repelling the assault" requirement of the Code.

The theory of the battered woman syndrome thus provided justification for the acceptance of self-defence. In accepting this, the court's focus was more on the question of the admissibility of the expert evidence rather than on the major factor which is supposed to form the substantial part of the decision, that is, whether or not to allow a person to kill on fear of her death from her battering partner at the moment an actual attack was not in progress.[54] This is the only set-back *Lavallee's* judgement

54 One commentator states:

would have faced. Certainly, this decision has been roundly applauded by feminists and lawyers who believe that special consideration must be given to battered woman cases. However, the issue certainly does not seem to have been satisfactorily settled. The fear that it might be asserted that any battered woman could find her response to be privileged under the new theory is certainly well grounded.[55]

5.4.7 *R. v. Lavallee*: a conclusion

The decision in *Lavallee* is widely viewed as a new development in the law of self- defence, at least as far as Canadian criminal law is concerned. Allowing a plea of self-defence to a woman who kills without satisfying the imminence requirement is, indeed, a departure from the classical law of self-defence. By assessing the accused's belief on the basis of what she herself thinks reasonable, and also by taking into consideration her perception of the deceased throughout their relationship, the traditional conception of "reasonable man" itself has now been altered. The result of *Lavallee* could also be stated thus: the requirements of the law which have long been upheld appear now to have been changed in favour of an approach which will strike

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"The issues had become clearly established by this stage as evidentiary rather than substantive. That is, the appeal focused on the status of Dr. Shane's testimony, not on whether it is justifiable to defend oneself by shooting an unarmed person in the back of the head. This is mysterious. For some reason, both at the trial and appeals levels, the courts viewed this as an "expert evidence" case, not an "imminent attack" one."
C. Boyle, "*The Battered Woman Syndrome And Self-Defence: Lavallee v. R.*" [1990] 9 Canadian Journal of Family Law 171 at p. 172.

55 C. Boyle in concluding her discussion on the case of *Lavallee* commented that the Supreme Court's judgement in favour of the battered woman may, at the best, be hailed as a step towards recognising the need to have a woman's perception of a case be given serious consideration. The corollary of this is to accept the need to differentiate between a male accused and female accused in a murder case. It must not, however, be assumed that a woman facing criminal charges will have no difficulty in having her perspective perceived as reasonable in Canadian courts.
C. Boyle, *ibid.*, at p. 179.

many as more acceptable. If the previous law were to be applied strictly in battered woman cases, the result would be too harsh and this has certainly now changed.

5.5 BATTERING AND THE DECISION IN *R. v. WHYNOT*[56]

In this case the accused shot her sleeping common law husband as he lay passed out in his truck. At trial she was granted a defence of "prevention of assault" under section 37 of the Canadian Criminal Code; the trial court decided that the accused's act was justified in that it was necessary to protect the life of his neighbour and her son, (whom the deceased had repeatedly threatened to kill), and that the manner in which the defence was conducted was not in any way in excess of what would be necessary.

The accused lived with the deceased together with their son, and her son by another. Near their house there was a trailer occupied by their neighbours. The evidence at trial indicated that the deceased dominated the household and exerted his authority by striking and slapping the various members and from time to time administering beatings to the accused and the others. On the day of the killing the accused was asked by the deceased to drive him to his friend's home, where he became heavily intoxicated. On many occasions the deceased was said to have mentioned that he would burn to death his neighbour, and also kill the accused's son. On their way home, these threats were again repeated. It was due to this threat, coupled with the fact that she had previously been threatened with death should she try to leave, that the accused on returning home shot the deceased.

The Crown asserted that the killing was premeditated and well arranged. The shooting took place when the accused was aware of her act and the consequences thereof. The theory of the defence, on the other hand, was that the accused shot the deceased in the reasonable belief that he was going to assault her son and that such force was really necessary.

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56 *Supra*, fn. 45.

The trial judge in his direction to the jury asserted that the case was one of self-defence and involved section 37 of the Canadian Criminal Code. Section 37 states:

"(1) Every one is justified in using force to defend himself or any one under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it.

(2) Nothing in this section shall be deemed to justify the willful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent."

There were two main questions for the jury to decide: firstly, whether in causing the death of the deceased, the accused did really act to defend herself or persons under her protection in line with the requirement stated in the Code, and secondly, if she did act to protect herself or persons under her protection, whether the amount of force used was necessary.

In relation to the first issue, the trial court asked the jury to consider the state of mind of the accused and all factors affecting her state of mind. In relation to the second, whether or not the amount of force used was necessary, this was to be assessed objectively and not from the perspective of the accused alone.[57] By virtue

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57 The trial judge's instruction reads:
"Now when you address the question of the amount of force that was used it is not the accused, it is not from the perspective of the accused that you should look at the question- you should look at the question as an objective question, and it really is whether an ordinary reasonable person who knew the kind of man William Stafford was would in the circumstances have believed that it was necessary to kill him."
R. v. Whynot, *ibid.*, at p. 462.

of this direction, the jury concluded that the accused did act to protect her son from being assaulted by the deceased and therefore, the killing was justifiable.

The Court of Appeal presumed that there are two possible ways that the jury could have reached the verdict of not guilty. First, they may have had reasonable doubt as to whether the accused really did the killing or it was in fact done by the accused's son as it was also claimed in the trial. Second, if they understood from the trial judge's instruction that section 37 of the Criminal Code permitted the accused to anticipate a possible assault against her son from threats made earlier in the evening and that she used reasonable force to prevent such an assault.

The Court of Appeal, in any event, disagreed with the way the case was conducted in the trial court on the grounds that it was not appropriate to apply section 37 of the Code.[58] The wording of the provision is intended only to justify killing by a person who suffers an actual assault, or where there is an actual assault on the person he or she intended to defend. In the absence of this requirement, there seems to be no other way in which a killing could be justified under this provision. To justify the accused's conduct in such a case would be tantamount to allowing anyone to kill merely out of fear of a threat that may or may not be carried out. Hart J.A. in

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58 Hart J.A. in his judgement stated:
"I do not believe that the trial judge was justified in placing s. 37 of the *Code* before the jury any more than he would have been justified in giving them s. 34."
He later asserted:
"In my opinion, the trial judge in this case should have ruled that in law there was no legal foundation in the evidence to merit a justification of the act of killing the deceased as a means of defending Jane Stafford's son from any assault by Billy Stafford. As he did with s.34 of the *Code* he should have refused before the jury any justification of her actions under s. 37. . . . .The jury should not have been permitted to consider a possible assault as a justification of her deed, and s. 37 of the *Code* should not have been left with them."
R. v. Whynot, *ibid.*, at p. 464-465.

delivering the judgement stated that the provision had been too broadly interpreted and that this was not intended by Parliament.[59]

5.5.1 *R. v. Whynot* and the theory of the battered woman syndrome

It must be pointed out that the case under discussion did not deal specifically with the theory of the battered woman syndrome; neither in the trial court nor in the appeal level was any reference was made to this theory. In the course of the trial it was indicated that the deceased has been a continuous threat to the accused. The life of the members of the whole family would be threatened if the accused left the relationship. It was also claimed, the killing was done in the accused's belief that the deceased would, on the night in question, make good his threat to kill her son. It was evidence such as this which pointed to the fact that the accused at the time of committing the killing was overwhelmed.[60] The trial court had indicated the relevance of the circumstances surrounding the accused when, in its direction, the jury was asked to take into consideration "the state of mind of the accused and all factors affecting her state of mind."[61] However the matter seems to stop at that juncture without any attempt to observe the accused's mental and physical condition. If it was intended to look at the accused's state of mind as directed, perhaps, the

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59 Hart J.A. said: "The instructions given to the jury regarding s. 37 were broad enough to say that a person is justified in killing anyone who has threatened them and is likely to carry out such threat. I do not believe that Parliament intended such an interpretation of the section." *R. v. Whynot.*, *ibid.*, at p. 463.

60 There were some psychiatric evidence adduced on behalf of the defence which tended to show that Jane Stafford was at her wit's end when she committed the killing. The accused also testified that she could not leave the deceased because he had threatened to kill all of the members of her family, at one time, should she do so. This testimony seems to comply with the theory of learned helplessness adopted by Dr. Lenore Walker in her battered woman syndrome. However, this testimony carried very little weight as the question of battered woman syndrome itself was not invoked.

61 *Regina v. Whynot*, *supra*, fn. 45 at p. 462.

testimony of an expert witness explaining the situation would meritably be required, had that been adduced, it would have substantially changed the nature of the case.

The primary issue in *R. v. Whynot* was therefore whether section 37 was the proper defence for the accused. In other words, the question was whether she had acted in defence of persons under her protection and whether her conduct in their defence was necessary and within the limitations prescribed by the law. The trial court as well as the Court of Appeal had essentially decided on the substantial aspect of the law of self-defence - whether a person would be justified in adducing self-defence merely on the strength that the life of someone under her protection was threatened. This would be so even without satisfying the imminent attack requirement, as the shot was made in the absence of an actual threat. For this matter the jury, guided by the trial judge's instruction, found that the defence should be allowed. The Court of Appeal for the reasons already explained, overruled this decision.

5.5.2 *R. v. Lavallee*[62] and *R. v. Whynot*:[63] some discussions

The two cases were similar in that both accused were woman living under constant threat from their husbands. In *Lavallee*, the woman killed her husband because of the continuous threat and assaults she had suffered, and she believed that without taking such steps, she would herself be killed. In *Whynot*, the accused killed the husband in defence of her son and not really for her own self-defence. It was committed in the belief that unless she acted as she did, the life of her son would be seriously in danger.

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62 *Supra*, fn. 34.

63 *Supra*, fn. 45.

The fundamental difference between the two is this: whereas in *Lavallee* the trial court admitted the importance of an expert witness (which was approved in the Supreme Court), in *Whynot*, the court did not find it necessary to do so. Now, it seems that the reason why the court took a different approach in the two cases may be that the court in each case was dealing with a different provision in the Code. In *R. v. Whynot*, reference was made to section 37 of the Code and, therefore, the case was treated as a claim of a "prevention of an assault". The section states:

(1)

"Every one is justified in using force to defend himself or any one under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it."

(2)

"Nothing in this section shall be deemed to justify the willful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent."

The wording of this provision necessarily required the accused, in the use of force, to act only in defence of her life or the life or those under her protection. The force used must, furthermore, be commensurate with the nature of the assault intended to be prevented. In the event where the force used is greater than that which was necessary, this provision cannot justify her act. The section obviously suggest a very rigorous proportionality test before any force can be justified in the name of self-defence.

The sort of case for which the provision was designed presupposes an assault which is underway and posing an imminent threat to the life of the accused. Therefore, by virtue of this provision, the central discussion in the case focused on whether or not the accused's use of force was really necessary in defending the life of a person under her protection and whether the force itself was not excessive compared to the assault she was attempting to prevent.

Not a great deal of attention was paid to the issue of the reasonableness of the accused's belief as to the necessity of killing in self-defence. The reason for this is, as explained, the reasonableness of the act was not made the main issue in section 37. Had the reasonableness of her belief became the central issue, it is highly likely that it would have been necessary to call for an expert opinion as to her state of mind.

In *Lavallee*, on the other hand, section 34 of the Canadian Criminal Code was referred to. To restate this provision:

Section 34 (2)
"Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if

> (a) he causes it under 'reasonable apprehension' of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes, and
>
> (b) he 'believes on reasonable and probable grounds', that he cannot otherwise preserve himself from death or grievous bodily harm."

As is apparent, the requirement of reasonableness is stressed. An accused can only be justified in killing or causing grievous injury if he believes and believes reasonably that, i) his life is in immediate danger, ii) that the manner of his defensive action is really necessary, and that without exercising such force his life will in turn be in peril. If the court is satisfied that the accused has been reasonable in apprehending the danger and also reasonable in his defensive conduct, whether or not the amount of force used is more than what would be necessary will not be the point of discussion. At this point the different between section 34 and section 37 becomes clear. In short, whereas section 37 points out the importance of the proportionality requirement, section 34 stresses that as long as it is satisfied that the accused has been reasonable in the apprehension of the danger, and that he believes that the repelling force used was the only way to safe his life, whether or not the amount of force used is more than required will not be a bar to his claim of self-defence under the provision.

5.5.3 Distinguishing "evidentiary" and "substantive" issues in *Lavallee* and the case of *Whynot*

The facts of *Lavallee's* case did not show that her act was reasonable at all at the time of the killing. This is due to the fact that the fatal shot was fired at the time when no actual assault had been initiated. This necessarily failed the test of imminence as stipulated in section 34 of the Code. Nevertheless, the court found it necessary to look at the state of mind of the accused at the time of the killing, as this would explain the reasonableness of her act. To achieve this, the opinion of an expert was held to be necessary.

Having had to consider the accused's reasonable belief and her claim of battered woman syndrome, the court then dealt with evidentiary matters rather than the matter of substance, that is, whether the killing could be justified when the threat or assault was not imminent. Had the case been seen as one of "imminent attack", it would have focused on the doctrine that limits self-defence to situations where a person is actually being attacked or is about to be attacked, exactly the approach taken in *Whynot's* case. However as the law, or more specifically section 34 of the Code, requires the accused to have reasonable apprehension that her life is in serious danger, her reasonable belief had thus became the primary issue. This issue could only be resolved by reference to expert opinion. Thus, the case turned out to be one of an "expert opinion" rather than "imminent attack".

The two cases discussed above show two distinct attitudes in Canadian courts in the treatment of female accused in murder cases. The Nova Scotia Court of Appeal did not make any meaningful observation on the battered woman syndrome, as the issue itself had not been seriously discussed in the trial court.[64] The application of section 37 provides the reason for the Court of Appeal's attitude. As explained, the provision did not make a requirement of reasonableness as the primary condition to a plea of self- defence under the law.

On the other hand, in *Lavallee* the Canadian Supreme Court agreed with the need to have the accused's case testified to by an expert. This is important in that the court has now indicated its willingness to recognise the theory, the function of which, is the justifying of an act which under ordinary circumstances would not have been

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64 Hart J. admitted a great deal of evidence adduced by both the prosecution and the defence about the character of the deceased in order to explain the accused's perception towards him and also to explain the state of mind of the accused at the time of the killing. However he stressed that much of this evidence was not admissible for it served only to create sympathy for the respondent.
Regina v. Whynot, *ibid.*, at p. 461.

justified. As section 37 affected the judges approach towards *Whynot's* case, the application of section 34 had evidently affected the whole discussion of the case in *Lavallee*. The requirement that the accused should have reasonably apprehended an attack made the discussion focus mainly on her reasonable believe of the danger she might be confronting. And, as explained, this makes the opinion of an expert indispensable.

The application of the battered woman syndrome in the Canadian Supreme Court was positively received by many commentators as well as by feminists. Stuesser characterised the Supreme Court's decision as "fair, just, and correct in law."[65] Martinson stated: "The willingness of the Supreme Court of Canada to address gender bias in an area of substantive criminal law, an area that can affect the lives of a significant number of Canadians, is commendable. Wilson J., in the February memorial lecture, saw no reason why the judiciary cannot exercise "some modest degree of creativity in areas where modern insights and life's experience have indicated that the law has gone awry". The court did just that in the *Lavallee* decision."[66] She also suggested that the *Lavallee* approach to the construction of reasonableness and the imminent danger requirement to be extended to other criminal law doctrines.[67]

Isabel Grant, nevertheless expressed her scepticism on the reliance of expert evidence on battered woman syndrome. She was of the view that by heavily relying on expert evidence, the court implicitly sent the message that without this evidence

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65 L. Stuesser, "*The "Defence" of "Battered Woman Syndrome" in Canada*", *supra*, fn. 25 at p. 210.

66 D. Martinson, "*Lavallee v. R. - The Supreme Court of Canada Addresses Gender Bias In The Court.*" (1990) 24 U.B.C.L.Rev. 381 at p. 396.

67 D. Martinson, M. MacCrimmon, I. Grant and C. Boyle, "*A Forum On Lavallee v. R: Women And Self-Defence*" (1991) 25 U.B.C.L.Rev. 23 at p. 36.

the woman's perception of reality would not be accepted. The writer suggested: "we must not develop rules such that only woman who fall into stereotypical description of "battered woman" are allowed to raise a claim of self-defence. The focus must be on what the woman did and on the context in which she did it: the presence or absence of "battered wife syndrome" should never be determinative."[68]

The application of the battered woman syndrome theory in court is seen as a step towards recognising the need to differentiate between female and male offenders, particularly in murder cases. This would also mean that women facing criminal charges would now have their perspective sympathetically considered, therefore raising their chances of acquittal. However, looking at it from another perspective, it could also be said that this theory would only be considered if the law referred to in the defence is section 34 of the Canadian Criminal Code, as the law in this section specifically required the accused's belief to be reasonable. That it should be applicable to other self-defence laws, especially section 37, seems unlikely as the accused's reasonable belief is not the main ingredient for the accused's success in her claim of self-defence.

5.5.4 Conclusion

In *R. v. Whynot*, The Nova Scotia Court of Criminal Appeal stated that to justify an accused's act of killing in the absence of the important ingredient constituting the law of self-defence, that is, the imminence test, would mean to allow a person to kill when there is no more than a fear that her life is in danger. This is not what the court should allow and certainly not the way section 37 should to be interpreted. Hart J.A. stressed:

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68 D. Martinson, M. MacCrimmon, I. Grant and C. Boyle, *ibid.*, at p. 59.

" In my opinion, no person has the right in anticipation of an assault that may or may not happen, to apply force to prevent the imaginary assault"[69]

On the contrary, Wilson J. in The Canadian Supreme Court in *Lavallee* stated:

"The requirement imposed in Whynot that a battered woman wait until the physical assault is "underway" before her apprehensions can be validated in law would, in the words of an American court, be tantamount to sentencing her to murder 'by installment': State v. Gallegos, 719 P.2d 1268 (N.M. 1986), at p. 1271."[70]

The difficulty of the battered woman who kills in self-defence is the fact that she has, in fact, killed someone. The dictum in *Whynot* proved the fact that once a crime of murder is committed, it has to be taken seriously. The idea behind this is that the law should not lightly justify a criminal act, all the more so if the crime involves the life of another human being.

The judgement in *Lavallee* will certainly have a major implication as it emanates from the highest court in Canada. However it is doubtful whether this judgement is likely to provide an accused with a complete acquittal after she has satisfied the court that she is a battered woman. The judgement of *R v Whynot* may have been overruled by the Supreme Court's decision, yet its tenor certainly still finds support in some quarters.

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69 *R. v. Whynot*, *supra*, fn. 45 at p. 464.

70 *R. v. Lavallee*, *supra*, fn. 34 at p. 883.

CHAPTER SIX

THE THEORY OF THE BATTERED WOMAN SYNDROME IN ENGLISH AND AUSTRALIAN LAW

A. THE THEORY OF THE BATTERED WOMAN SYNDROME IN ENGLISH COURTS

6.1 INTRODUCTION

6.1.1 Self-defence in English courts

The English criminal law on self-defence is governed by the rules laid down at common law as well as section 3 (1) of the Criminal Law Act 1967. The traditional doctrine of self-defence at common law requires that the defence should have been necessary in self-defence. From this limitation derives the test of "imminence", "the duty to retreat" and also the requirement that the amount of force should not be more than is necessary in the defence - a test of "proportionality". The statutory requirement laid down under section 3 (1) of the Criminal Law Act 1967 on the other hand states:

"A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or of persons unlawfully at large."

This provision refers to cases of prevention of crime or arresting offenders rather than specifically explaining the law on self-defence. However, it has been argued that a person who defends himself against an unlawful attack has also acted

in prevention of crime and thus his claim of self-defence falls within the scope stated in the Act.[1] Hence, it is likely that the requirement of "reasonable in the circumstances" stated in the Act will have a significant bearing in self-defence cases.

One question arises here is whether the provision in the Criminal Law Act 1967 overrules the common law requirements of self-defence. Section 3 (2) of the same Act states:

"Subsection (1) above shall replace the rules of the common law on the question when force used for a purpose mentioned in the subsection is justified by that purpose."

One commentator[2] has proposed three possible interpretations:

1. Section 3 of the Criminal Law Act 1967 totally replaced the defence of self-defence.

2. Section 3 deals only with public defence; the common law rules remain in being in respect of private defence.[3]

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1 Smith and Hogan argue:
"Private defence and the prevention of crime are sometimes indistinguishable. If D goes to the defence of E whom P is trying to murder, he is exercising the right of private defence but he is also seeking to prevent the commission of crime. It would be absurd to ask D whether he was acting in defence of E or to prevent murder being committed and preposterous that the law should differ according to his answer. He was doing both." In the later part of the discussion on the same issue, the writers explained:
"Where D is acting in defence of his own person it may be less obvious that he is also acting in the prevention of crime but this will usually be in fact the case, D's purpose is not the enforcement of the law but his own self-preservation; yet the degree of force which is permissible is the same. An inquiry to D's motive is not practicable." The writers seems to conclude that the act of self-defence and prevention of crime in a situation explained is indeed invariably synonymous.
Smith and Hogan, "*Criminal Law*" (8th Ed. 1996), at p. 263.

2 C. Harlow, "*Self-Defence: Public Right or Private Privilege*" (1974) Crim.L.R. 528.

3. Self-defence and section 3 co-exist as defences, but any common law rules inconsistent with the overall test of reasonableness are replaced. The writer suggests that, though not explicitly underlined, it could not be denied that in practice the effect of the section has been precisely in concert with the third interpretation. The third interpretation is consonant with another commentary, where it has been said that the common law of private defence still exist "but if, and in so far as, it differed in effect from s.3 of the 1967 Act, it has probably modified by that section." By this, the writers meant to say that s. 3 of the Criminal Law Act 1967 may be taken as having the effect of clarifying the common law rules.[4]

The fact is that the doctrine of self-defence in common law is deeply entrenched in English courts and that any attempt to change it dramatically would be virtually impossible. In any case, the requirement of "reasonable in the circumstances" itself is a very vague standard and undefined. It would be possible that, in ascertaining the reasonableness of the accused's act, the test of proportionality and duty to retreat (the common law requirements) would be observed. In other words, the accused's use of force could not be reasonable unless it was both necessary and proportionate. Thus it would be possible that the common law requirements of proportionality, the duty to retreat, and the requirement of reasonableness asserted by the Act could be merged together in deciding cases involving a claim of self-defence.[5]

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3 C. Harlow explained the distinction between private-defence and public-defence. He agreed with Hale's classification in that private defence is referred to the defence of one's own property against robbers and burglars, and public defence is concerned with defence against felony involving violence. C. Harlow, *ibid.*, at p. 529-530.

4 Smith and Hogan, *supra.*,fn. 1 at p. 263.

5 It was explained that there are two principal requirements governing English law in self-defence, that is, the requirement that the force used should have been necessary and the requirement that the defence must be reasonable in the circumstances. The former supports two separate limitations. The first is what is known as the test of necessity. The second is the test that the repelling force used must be proportionate to the danger one is defending against. It was further elaborated that in many instances courts have required that the

6.1.2 The test of "reasonableness": bias against a woman accused?

The test of "reasonableness" in self-defence has been developed largely, if not altogether, through cases concerning male defendants. The reason for this is probably that the majority of murder cases have involved male accused and rarely involved female offenders. For this reason, many cases in which women killed in order to protect their own lives or those of their children were simply not perceived as instances of self-defence. As observed by one commentator,[6] the relative scarcity of female killers has resulted in a paradigmatically male ideal model of self-defence and this, together with the apparently gender-neutral concept of reasonableness, is actually weighted against the female defendant. This commentator referred to the case of Janet Gardner, a case in which a woman lived in an abusive relationship with her husband for some five years. She had been the subject of continuous beating throughout the relationship. At the time of the killing she was seriously attacked by the deceased. She grabbed a knife on the wall and fatally stabbed the deceased in her attempt to protect her own life. Evidence was led that she had many times tried to leave the relationship but was persistently tracked down by the deceased.

In reducing her five years sentence for manslaughter on the ground of provocation, the Court of Appeal warned that there were "exceptional circumstances" in the case and asserted that the year she had already spent in jail was sufficient to "expiate in some measure the guilt she must feel for the rest of her life". This case was then compared with another case which was decided a day before the judgement. In that case the accused had shot dead a person with whom he had an

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defensive act be proportionate in order to be reasonable. This line of argument proves that in many ways the requirement of reasonableness merged with the common law requirement in self-defence.
A. Ashworth, "*Self-Defence and The Right to Life*", 34 C.L.J. (1975) 282 at p. 284-285.

6 A. McColgan, "*In Defence of Battered Woman Who Kill*", 13 Oxford Journal of Legal Studies 508 at p. 515.

argument. The judge directed the jury to acquit the accused on the ground that the prosecution had failed to prove that he was not acting in self-defence. The accused was fined for possessing a fire-arm without a certificate. The point which was stressed by the writer was that in the latter case, the court did not feel that there was a need to expiate his guilt over the death of the deceased whereas in the former, where the accused person was a female offender, the court clearly took the view that the period of imprisonment she had undergone was necessary for her to realise the gravity of the crime she had committed. From the two cases cited the writer concluded that, in actuality, the defence of self-defence was not readily advanced on behalf of battered women who kill. In a case where a battered woman accused was clearly confronting a serious danger, her defensive conduct was not acknowledged as a necessary act to save her life. However, when a man acted aggressively against his attacker, this was readily regarded as an instance of self-defence.[7] Thus, it would not be surprising that in English courts battered women were more inclined towards pleading defences other than self-defence even when self-defence seems to be the proper ground of defence.

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7 The case of Janet Gardner and Barry Crane was quoted from the commentaries by A. McColgan in her article. *Ibid.*, at p. 515.

6.2 THE CASE OF *R. v. AHLUWALIA*[8]

6.2.1 The facts of the case

The appellant came from a middle class Indian family and entered into an arranged marriage with the deceased. From the very outset of the marriage she had been ill-treated and abused by the deceased. A series of battering incidences was reported in the trial court. In 1981 there was a report of her being hit three or four times on the head with a telephone and thrown to the ground. In 1983 the court was told, she was pushed by her husband whilst pregnant and sustained a bruised hand. In the same year, not very long after this incident, she sustained a broken finger in another argument. The severity of the relationship was proved by the fact that in her desperate act to escape the abuse she had twice attempted suicide in 1983 and 1986.

The court was also told that an injunction had already been made to restrain the deceased from hitting her. This order was not successful in stopping the deceased's violent behaviour; in 1986 he tried to run her down at a family wedding. A second injunction was granted after she was seriously beaten and threatened with a knife, but in spite of this, the violence continued and even intensified.

In support of her claim that she was subject to brutality on the husband's part, medical evidence was produced. The appellant's doctor confirmed that he found bruising to her face and wrist in 1983. Her work supervisor testified that she had lost weight and showed signs of nervousness and distress. The appellant's sign of distress was also spoken by her workmate and by various relatives. In addition to this physical torture, the appellant was further mentally humiliated when she found out

8 [1992] 4 All ER 889.

that her husband was in fact having an affair with another woman. Despite this humiliation, however, she opted to remain in the matrimonial home; the reason for her tolerance was her sense of duty as a wife and her concern for the welfare of the children.

On the day of the killing, the appellant had tried to discuss their marriage. The deceased did not show any interest in discussing the matter and, instead, threatened to beat her the next day if she did not give him money to pay the phone bill. The deceased then went to iron some clothes and threatened to burn the appellant's face with the hot iron if she did not leave him alone.

The appellant claimed that she was deeply frustrated by the deceased's refusal to talk to her. She also claimed to be overwhelmingly worried by the deceased's threat to beat her if she failed to give him money the next day. After brooding for some time, the she went outside, fetched some petrol, lit a candle, poured the petrol in the deceased's room and ignited it. The deceased, on fire, ran to immerse himself in the bath and was later helped by alerted neighbours. He suffered severe burns, and died some six days after the incident.

The appellant was charged with murder. She contended that she had no intention to kill or cause her husband serious bodily injury but only to inflict pain on him. Apart from being psychologically affected by the violence she had suffered, the main reasons for burning her husband on the night in question were that she was overwhelmingly frustrated by the deceased's refusal to talk about their future and the physical threat to her if she failed to provide the deceased with the money asked for. These arguments were rejected in the trial court, where she was convicted of murder and sentenced to life imprisonment.

6.2.2 The grounds of appeal: sudden and temporary loss of self-control

One of the grounds of appeal turned on the applicability of a classical requirement in the defence of provocation. In the case of *R. v. Duffy*,[9] Devlin J. laid down a classical definition of provocation in common law. He said:

"Provocation is some act, or series of acts, done [or words spoken]. . . which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind."

This judgement was brought to the attention of the jury. The jury was further instructed that those who purported to rely on the defence of provocation must satisfy the court that they have, at the time of the killing, lost control of themselves. If this test is not satisfied, the defence of provocation would be rejected. The appellant's counsel argued that there had been a misdirection in the trial court and argued that the requirement of "sudden and temporary loss of self-control" was in actual fact wrongly referred to. He argued that the direction in the case of *R. v. Duffy* was based on a failure to comprehend the true meaning of s. 3 of the Homicide Act 1957 as explained in *D.P.P v. Camplin*.[10] This section states:

"Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation is enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and

9 [1949] 1 All ER 932.

10 [1978] 2 All ER 168.

said according to the effect which, in their opinion, it would have on a reasonable man."[11]

Lord Diplock in *D.P.P. v. Camplin* referred to that section as abolishing "all previous rules of law as to what can or what cannot amount to provocation". The appellant's counsel hence argued that this pronouncement had effectively overruled the requirement of "sudden and temporary loss of self-control" as defined in *R. v. Duffy*.[12] The Court of Appeal however, rejected this contention. Lord Taylor was of the view that, by virtue of a number of authorities, the requirement of "sudden and temporary loss of self control" laid down in *Duffy* was good and applicable.[13]

Therefore, as far as the argument on the validity of the traditional law of provocation is concerned, the Court of Appeal in *R. v. Ahluwalia* saw no reason why it need be ignored. The requirement of "sudden and temporary loss of self-control" is still to be observed and satisfied.

6.2.3 The second ground of appeal: on the issue of the "characteristics" of the appellant

The second ground of appeal concerned with the trial judge's direction to the jury regarding the "characteristics" of the appellant which would have been relevant

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11 *R. v. Ahluwalia*, *supra*, fn. 8 at p. 894.

12 *Supra*, fn. 9.

13 In reaching this conclusion Lord Taylor referred to a number of authorities which approved and followed the definition of provocation as defined in *R v. Duffy*. These cases are, *R. v. Ibrams* (1981) 74 Cr App R 154, *R. v. Whitfield* (1976) 63 Cr. App. R. 39 and *R. v. Thornton* [1992] 1 All ER 306.

in determining the appellant's claim of provocation. The trial judge's direction to the jury contained this passage:

"The only characteristics of the defendant about which you know specifically that might be relevant are that she is an Asian woman, married, incidentally to an Asian man, the deceased living in this country. You may think she is an educated woman, she has a university degree. If you find these characteristics relevant to your considerations, of course you will bear that in mind."[14]

This direction was criticised as being too specific. It did not allow the jury to take into account any other characteristics that might affect the gravity of the provocation. The defence went on to argue that the trial judge had failed to realise the importance of the fact that the appellant was, as a result of the traumatic experience, suffering from battered woman syndrome. It was suggested that as a result of the battering relation, the appellant was in the state of "learnt helplessness".

Lord Taylor rejected this argument by asserting that the mental condition of the appellant would only be relevant if expert witnesses on this matter were brought to testify in the trial court. In the words of Lord Taylor:

"In the present case, there was no medical or other evidence before the judge and jury, and non even from the appellant, to suggest that she suffered from a post traumatic stress disorder, or 'battered woman syndrome' or any other specific condition which could amount 'characteristic' as defined in *R. v. McGregor.*[15] It was true that there was considerable evidence that the appellant had suffered grievous ill-treatment, but there was nothing to suggest that the effect of it was to make her 'a

14 *R. v. Ahluwalia, supra*, fn. 8. at p. 897.

15 [1962] NZLR 1069.

different person from the ordinary run of [woman]', or to show that she was 'marked off or distinguished from the ordinary [woman] of the community."[16]

The judgement explained that the reason for the rejection of the appellant's argument was based on the fact that no expert testimony was offered describing her mental condition. By this Lord Taylor seems to suggest that should evidence on battered woman syndrome be adduced, the whole scenario of the case could be deeply affected (most likely in favour of the appellant). The judge asserted:

"Had the evidence which had now been put before this court been adduced before the trial judge, different considerations may have applied. As it is, we consider that there was no basis for the judge to refer to a characteristic consisting of an altered personality or mental state in this appellant. Nor do we consider that, on the evidence before them, the jury would have been justified in finding such a characteristic."[17]

The quotation above made it clear that had the evidence on battered woman syndrome been adduced in the trial, it would be possible that this ground of appeal might be considered. Since it was not put forward, the appeal was dismissed.

In short, two main grounds of appeal were argued by the appellant's counsel:

1) that the trial judge was wrong in stressing on the requirement of sudden and temporary loss of self control. The reason being that this requirement derived from the classical definition of provocation in *R. v. Duffy*[18] and that it was replaced by

16 *R. v. Ahluwalia*, *supra*, fn. 8 at p. 898.

17 *Ibid.*, at p. 898.

18 *Supra*, fn. 9.

section 3 of the Homicide Act 1957, as asserted by Lord Diplock in *D.P.P. v. Camplin*.[19]

2) that the trial judge was also wrong not to consider the issue of "battered woman syndrome" as the accused, according to the appellant's counsel, had clearly been psychologically affected by the battering relationship she had undergone throughout her stay with the deceased.

Lord Taylor rejected the first ground of appeal and as explained above, refused to entertain the second ground of appeal.

6.2.4 The partial defence of diminished responsibility

Having dismissed the two previous grounds of appeal, the court went on to consider the third issue, that is, the question of diminished responsibility (which was not even raised at the trial). The Court of Appeal clearly considered this ground of appeal as the strongest of the three. Lord Taylor concluded that it would be expedient in the interests of justice to admit the fresh evidence under s 23 (1) of the Criminal Appeal Act 1968. An order of retrial was made and the conviction quashed.

The re-trial of the case was heard on 25th September 1992. Hobhouse J. convicted Ahluwalia of manslaughter and imposed a sentence of three years and four months imprisonment, exactly the length of time she had already served. This case has essentially signified the admissibility of the theory of the battered woman syndrome in English courts.

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19 *Supra*, fn. 10.

6.2.5 Commentaries on *R. v. Ahluwalia*

Perhaps the most interesting point raised in the Court of Appeal in *R. v. Ahluwalia* was Lord Taylor's observation on the issue of the battered woman syndrome. He suggested that had the issue been raised and supported by expert opinion at the trial level, "different considerations may have applied". The matter is now open as to the meaning of "different considerations" mentioned. It could be presumed that the theory of the battered woman syndrome would in the end be used to explain the reasonableness of the appellant's act and that the main defence would necessarily be changed from provocation to a justified defence of self-defence. The consequence of this would then be that if the jury were satisfied that the appellant was at the time of the killing suffering from the condition, this would render her act reasonable and she would be entitled to a complete acquittal. Nevertheless, in a case where the jury is not convinced of the story, it is equally possible that she will be held entirely responsible for the killing and be convicted of murder.

In spite of this, it seems highly unlikely that the case would be considered on the basis of self-defence. Perhaps Lord Taylor himself, having made such a statement in his judgement, did not envisage the raising of this defence. In addition, at the time when the case was decided, there was no English authorities where a battered woman had succeeded in raising self-defence on the basis of the battered woman syndrome.

6.3 THE CASE OF *R. v. THORNTON*[20]

6.3.1 The facts of the case

The appellant in this case was a married woman with a daughter who had been born before she met the deceased. The first marriage ended disastrously. It was reported that she had attempted suicide several times and was also admitted to a psychiatric hospital for a short time. In due course she met the deceased, whom she realised was a heavy drinker and was also jealous and possessive. Despite this, she moved into the deceased's house with her daughter. The deceased's drinking worsened and he started to behave violently at home.

In one of the many rows between the parties, the deceased's son, who lived with them in the same house, testified that the deceased picked up a guitar and threatened the appellant with it. The appellant for her part took a knife, held it in front of her pointing towards the deceased and in turn, threatened the deceased with it if he should cause distress to her daughter. Later that day, the appellant purposely, as she admitted, gave the deceased an overdose of Magodan tablets. She then telephoned the doctor saying that the deceased was feeling suicidal. Her reason for doing this, as she later explained, was to have the deceased committed to hospital. This did not happen as the deceased recovered shortly and was incensed by what the appellant had done to him. They then became involved in another quarrel.

On the night of the killing, they had had another argument. The appellant went to the kitchen to calm down. At the same time she looked for a truncheon in the kitchen's drawer allegedly to protect herself in case if she was attacked. Not

20 [1992] 1 All ER 306.

finding it, she found a knife, which she sharpened. She returned to the deceased, who was laying down half asleep on the sofa. The appellant asked him to come up to bed but was again greeting by wounding remarks. The deceased then threatened to kill her when she was asleep. The appellant then stood up in front of the deceased, holding the knife in her clenched hand over the deceased's stomach. She then brought it down towards the deceased thinking that he would ward it off. This did not happen and the knife entered the deceased's stomach and killed him. In her statement to the police she said that she did not intend to kill her husband but only to frighten him.

At her trial, the appellant relied mainly on the defence of diminished responsibility but since the provocative remarks the deceased had made leading up to the killing were adduced in evidence the trial judge was required to leave the defence of provocation to the jury as an alternative verdict.

The appellant's defence of diminished responsibility was supported by two psychiatrists. Both of the experts agreed that the appellant suffered from a personality disorder, which amounted to abnormality of mind, and that this was due either to retarded development of her personality or to inherent causes. They concluded that, at the time she killed the deceased the abnormality of mind was so pronounced that it substantially impaired her responsibility for her acts.

By contrast, a psychiatrist called by the Crown, while agreeing that she had suffered a mental abnormality, did not believe that at the time of the killing the abnormality of the appellant's mind was such as substantially to impair her mental responsibility for her action in killing the deceased.

In respect to the defence of provocation, the appellant contended that the trial judge had misdirected the jury particularly on the direction of the traditional requirement of "sudden and temporary loss of self-control". In this respect, the arguments were similar to that of in *R. v. Ahluwalia*.[21] The appellant's counsel argued that the requirement of "sudden and temporary loss of self-control", which was originated in *R. v. Duffy*,[22] was replaced by Section 3 of the Homicide Act 1957. The Court of Appeal rejected this ground of appeal. The requirement of "sudden loss of self-control" has long been an acceptable test to the claim of provocation and as such, nothing seems to be substantially wrong in making directions to that effect.

The Court of Appeal decided that to succeed in the plea of provocation, the manner in which the appellant was provoked must be of such a nature that she suddenly and temporarily lost her power of self control. The series of violence and provocative acts throughout the relationship did not cause the appellant a sudden and temporary loss of self control; the trial judge, therefore, had not been wrong in his direction. With regards to the second argument regarding the trial judge's direction on the question of diminished responsibility, the Court of Appeal did not think the trial judge had substantially erred in his recommendation to look at the two confronting views made by the experts from both parties in court. The appeal against the conviction was therefore dismissed.

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21 Refer to the discussion at p. 223 - 224, *supra*, of this chapter.

22 *Supra*, fn. 9.

6.3.2 The case of *R. v. Thornton*:[23] the second appeal

Some four years after Beldam L.J. in the Court of Appeal dismissed Sarah Thornton's appeal against her conviction, the case was again brought to court for reconsideration. The second appeal referred to fresh medical evidence which touched upon the defence of provocation. The appeal suggested that two characteristics possessed by the appellant at the time of the killing should be relevant to her claim of provocation, namely her personality disorder, and the effect of the deceased's abuse over a period of time on her mental state. It was argued that should evidence as to these have been led at the trial, the judge would have had to direct the jury to consider whether a reasonable woman with those two characteristics might have lost her self-control and have acted as the appellant did.

The Court of Appeal reaffirmed its previous judgement. A successful plea of provocation could only be made upon satisfying the test of sudden and temporary loss of self control. Even if the appellant was accepted as having been suffering from the battered woman syndrome, her provocation defence would not be successful if the jury were not convinced that the appellant had suddenly and temporarily lose her self-control at the time of the killing.[24]

Having explained the importance of the traditional requirement in the law of provocation, the court examined the fresh argument raised in the appeal, namely the issue of the battered woman syndrome. In the first appeal medical evidence explaining the appellant's mental condition was held to be irrelevant as to the

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23 *R. v. Thornton (No.2)*, [1996] 2 All ER 1023, [1996] Crim.L.R. 597.

24 In the second appeal the Court of Appeal stated: "A defendant even if suffering from that syndrome, cannot succeed in relying on provocation unless the jury consider she suffered or may have suffered a sudden and temporary loss of self-control at the time of the killing." *R. v. Thornton (No2)*, *ibid.*, at p.1030.

appellant's "characteristic" in the claim of provocation; in the present appeal, however, the court decided that the appellant's personality disorder, supported by evidence on battered woman syndrome, was a characteristic relevant to provocation. On these grounds, the Court of Appeal finally decided that it could not be sure that the jury's verdict in the trial was safe and satisfactory. Sarah Thornton had her conviction quashed and a retrial ordered.

The main difference between the second trial and the first was that this time the accused's mental condition was considered as a relevant characteristic to be considered in relation to the claim of provocation. The outcome was a conviction for manslaughter. It is interesting to note that the judgement focuses on diminished responsibility, with the judge saying: "I sentence you on the basis that your responsibility for the killing of your husband was diminished by an abnormality of mind, were I sentencing you for provocation, the sentence would have been the same."[25]

6.3.3 The case of *Sarah Thornton*: a summary

Sarah Thornton was found guilty of murder in her first trial, the defence of diminished responsibility and provocation having been rejected. Her first appeal in 1991, which mainly questioned the trial court's application of the long established principle of "sudden and temporary loss of self-control" in the law of provocation, and a misdirection on the issue of diminished responsibility, was unsuccessful. At that time, the theory of the battered woman syndrome had very little bearing on the fate of battered woman in English courts.

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25 This judgment was quoted by S. Edwards and C. Walsh in "*The Justice of Retrial?*" 1996 N.L.J. 146 (6747) 857.

The second appeal was heard in December 1995, came at a time when the landmark decision of *R. v. Ahluwalia*[26] had opened the door to the application of the theory of battered woman syndrome in English courts. This had necessarily affected the attitude of the judges in the second appeal. As a consequence, the Court of Appeal was of the view that to convict the appellant of murder without considering the evidence on the battered woman syndrome would be "unsafe" and "unsatisfactory".[27] The murder conviction was quashed and a retrial ordered.

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26 *Supra*, fn. 8.

27 *R. v. Thornton*, *supra*, fn. 23 at p. 598.

6.4 *R. v. AHLUWALIA* AND *SARAH THORNTON*: AN ANALYSIS

In *R. v. Ahluwalia*,[28] the Court of Appeal rejected the plea of provocation. The argument that the requirement of "sudden and temporary loss of self-control" had been substituted by section 3 of the Homicide Act 1957, which was referred to by the House of Lords in *DPP v. Camplin*[29] as "abolishing all previous rules of law as to what can or cannot amount to provocation", was emphatically rejected. In the second appeal in Sarah Thornton's case, the requirement of sudden and temporary loss of self-control was upheld as the principal ingredient of the law of provocation.

The appeal against conviction in *R. v. Ahluwalia* was successful on the basis that the question of diminished responsibility had not been properly discussed in the trial and that, it would not be just to ignore altogether the presence of fresh evidence regarding the appellant's mental condition. The fact that no medical evidence was adduced on behalf of the appellant at the first trial explaining her mental condition seems to have been a major factor in the Court of Appeal's decision to order the re-trial. The defence of diminished responsibility therefore played a major part in the manslaughter verdict in the retrial of Mrs. Ahluwalia.

In the first trial in *R. v. Ahluwalia*, the theory of "learnt helplessness", which was one of the two ingredients constituting the theory of battered woman syndrome, was introduced by the defence. It was adduced mainly to argue that as a result of the battering relationship the appellant had undergone throughout her life with the deceased, she had suffered from the syndrome and that, it was necessary to be considered in determining her liability at the time of killing the deceased. Battered

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28 *Supra*, fn. 8.

29 *Supra*, fn. 10.

woman syndrome, it was argued, thus served as one of the appellant's "characteristics" at the time of the killing.

This argument was rejected by the court. However the reason for the rejection is of particular interest. It was not accepted, not because the theory itself was considered defective; it was rejected on the basis that no medical evidence was adduced in support of the claim. And it is more interesting when the court itself stated that had evidence on the syndrome been supported by experts, "different considerations may have applied". At this point, one might ask what would be the consequence if evidence supporting the theory were in fact to be adduced in terms of expert opinion as the Court of Appeal required? Should it assist the appellant's plea of provocation? In the presence of medical evidence, it could be presumed that the court would then be directing the jury to accept the theory of "battered woman syndrome" as an explanation of the appellant's state of mind, and that this "state of mind" amounted to a characteristic possessed by the appellant during the time of the killing. And upon considering this "characteristic", it would be likely to help to convince the jury of the lack of mens rea on the part of the appellant.

In the second of Sarah Thornton's appeals, the Court of Appeal decided that the issue of battered woman syndrome was relevant to the defence of provocation. Lord Taylor explained that the theory may be applicable in two ways: firstly, a jury might more readily find a sudden and temporary loss of self control triggered by even a minor incident on the "last straw" basis where a defendant had endured abuse over a period, and secondly, depending on the medical evidence, the syndrome might have affected the defendant's personality so as to constitute a significant characteristic relevant to the second question a jury had to consider with regard to provocation.[30] As a result, a retrial was ordered.

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30 *R. v. Thornton (No2)*, *supra*, fn. 23 at p. 1030.

The judgement in *R.. v. Ahluwalia* has been hailed as a landmark decision in that, for the first time, the English Court of Appeal has openly accepted the admissibility of psychiatric evidence explaining the state of mind of an appellant as a result of a battering relationship with her husband. The "battered woman syndrome" was held to be relevant as evidence of the appellant's mental disability and in support of a claim of diminished responsibility. The significance of this is that, at least in the eyes of the court, at the time of committing the fatal act, a battered woman who kills her husband may be psychiatrically abnormal.

In the case of *Sarah Thornton*, the Court of Appeal admitted that the battered woman syndrome showed the appellant to be suffering from a personality disorder which amounted to a characteristic relevant to provocation. But, as in *R. v. Ahluwalia*, in this case, whether she was treated as being of diminished responsibility or as having been provoked is not a matter of particular importance. For Mrs. Thornton (and others who are in the same plight as her) the primary concern is not to be convicted of murder, even if she would still be convicted of manslaughter and subjected to punishment. To the "offender"- the "battered woman"- whether the ground for the reduction of the offence from murder to manslaughter is diminished responsibility or provocation would be of no importance.

6.5 THE JUDGEMENT OF THE PRIVY COUNCIL IN *LUC THIET THUAN v. R.*[31]

In this case the appellant and two other men were charged with the murder of, and robbery from, the appellant's former girlfriend. In his account to the police, the appellant stated that he and his co-accused had intended to rob the deceased and that one of his co-accused had killed her to prevent her informing the police that she had recognised the appellant. At his trial, however, the appellant gave an entirely different account of the crime, repudiating his earlier statement as having been procured by inducements from the police. His new account was to the effect that he and his co-accused went to the deceased's flat to collect money which she owed him, that she had taunted him about her new boyfriend and his own sexual inadequacy, causing him to lose control of himself and stab her repeatedly, thus causing her death.

Two defences were relied upon by the appellant at the trial, namely the defence of provocation and diminished responsibility. Two medical experts called by the defence testified that the appellant suffered from brain damage which could make it difficult for him to control his impulses. That evidence was corroborated to some extent by the Crown's medical expert. The trial judge however, when directing the jury on provocation, did not refer to the testimony of the medical experts. The appellant was convicted of murder and sentenced to death.

The appellant brought the case to the Hong Kong Court of Appeal on the grounds that section 4 of the Hong Kong Homicide Ordinance, which was identical to section 3 of the English Homicide Act 1957, required the judge, when directing the jury on the effect of the alleged provocation on a reasonable person having the

31 [1996] 2 All ER 1033.

characteristics of the accused, to direct them to have regard to the appellant's brain damage when considering whether a reasonable man having the characteristics of the accused would have reacted to the provocation as he did. The Court of Appeal dismissed the appeal and the matter was then brought to the attention of the Privy Council.

Lord Goff, in delivering the majority judgement (Lord Steyn dissenting) upheld the decision of the Hong Kong Court of Appeal. The judgement essentially says that mental abnormality is not a relevant characteristic for the purpose of the objective test in provocation. By virtue of this judgement it would appear that the dictum regarding provocation in *R. v. Ahluwalia* - in which it was suggested that post traumatic stress disorder or the battered woman syndrome might be a relevant characteristic for the purpose of the objective test in provocation, and the judgement in *R. v. Thornton*, which upheld the relevance of the battered woman syndrome in considering the appellant's claim of provocation - were both wrongly decided. The objective test in the law of provocation, thus, seems to have given no regard to the characteristics of the accused at the time of committing the offence. An objective reasonable test means a purely objective test. The accused's act would now be assessed by a hypothetical reasonable ordinary person not taking into account whatever mental or physical illness that he or she might have suffered at the time of committing the act.

The question now is what will be the effect of this judgement in future cases, especially when they involve the question of the reasonableness test in provocation defence? The answer to this is perhaps best provided by one of the commentaries on this case:

"The effect of *Luc* as a precedent. Decisions of the Privy Council are not binding on English courts; but when the board consist of five Lords of Appeal and may be thought to represent the opinion of the house of Lords, it can hardly be ignored."[32]

32 The commentary on the case of *R. v. Humphreys*, [1996] Crim.L.R. 131 at p. 134.

B. THE THEORY OF THE BATTERED WOMAN SYNDROME IN AUSTRALIA

CASES PRIOR TO THE INTRODUCTION OF THE THEORY IN THE COURTS

6.6 THE CASE OF *VIRO v. THE QUEEN*[33]

A new conception of the criminal law of self-defence in Australia[34] arguably developed in 1978 in the case of *Viro v. The Queen*.[35] Mason C.J. in the Australian High Court stated in his judgement in this case that "for the offence to be reduced from murder to manslaughter it must appear that the accused reasonably believed in all circumstances in which he found himself that an unlawful attack which threatened him with death or serious bodily injury was being or was about to be made."[36] This dictum was then incorporated into the six famous formulations intended to provide a guideline for the courts in dealing with future cases involving a claim of self-defence where there was a charge of murder or grievous bodily harm. The first of these provides:

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33 (1978-1979) C.L.R. 88.

34 The discussion on Australian criminal law here is focused mainly on the Australian States with common law jurisdictions.

35 This case was decided in the High Court of Australia. Two fundamental issues were discussed: (1) whether in the case involving the plea of self-defence the Australian court is bound to follow the decision of the Privy Council in *Palmer v. The Queen* [1971] A.C. 814. or whether the principle in the decision of *Regina v. Howe* is applicable.
(2) what should be the proper direction to the jury in self-defence cases.

36 *Viro v. The Queen*, *supra*, fn. 33 at p. 143.

1. (a) It is for the jury first to consider whether when the accused killed the deceased the accused reasonably believed that an unlawful attack which threatened him with death or serious bodily harm was being or was about to be made upon him.

(b) By the expression "reasonably believed" is meant, not what a reasonable man would have believed, but what the accused himself might reasonably believe in all the circumstances in which he found himself.[37]

The primary requirement derived from the above proposition is that any accused person claiming self-defence must in the first place have a reasonable belief that an unlawful attack was made or was about to be made upon him. This necessarily means that in a case where no actual attack was in the offing, the claim of self-defence will automatically be irrelevant.

However, looking at the provision from another, perhaps more pragmatic perspective, it could be argued that when a person kills another in the absence of an actual attack, he might still find some comfort in the wording of the proposition, where it is stated - when an accused killed someone, he reasonably believed that an attack which threatened him with death or grievous bodily harm "*was about to be made upon him*". It could be claimed that the words "was about to be made" would allow a person to take necessary steps in defence of his life even to the extent of killing the purported attacker at the time when the actual threat was not presently existing.

The argument of this kind finds support from S.M.H.Yeo[38] who states:

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37 *Viro v. The Queen*, *ibid.*, at p. 146.

"The description of an attack in the first proposition in Viro as one which "was about to be made" suggests that the law permits what may be termed a pre-emptive strike." However, it has to be borne in mind that there are two situations where a pre-emptive strike could happen. Firstly, a person could strike his purported attacker at the time when the person whom he is confronting has already behaved violently but, only that at that time there was no direct threat to his life. Secondly, a situation may arise where an accused acts in what he believes to be a self-defensive way at a time when the purported attacker was not in the course of assaulting him, nor otherwise behaving violently. In other words, the act of self-defence occurred when there was no immediate danger to the life of the accused.

The commentary by Yeo most probably relates to the first type of pre-emptive strike. This is due to the fact that in his elaboration of the issue reference was made to the case of *R. v. Lane*.[39] The facts in *R. v. Lane* suggested that the accused killed the deceased when he was acting aggressively, but the aggressive behaviour has not been directed against the life of the accused. The Supreme Court of Victoria decided that the issue of self-defence should be left to the jury. Therefore, as Yeo argues, the words "was about to be made" in Mason C.J.'s direction foresee a pre-emptive strike by an accused and, based on the arguments above, it has to be said that that pre-emptive strike is confined to a situation where the deceased has already been behaving dangerously but there is no evidence suggesting that the accused's life will become his ultimate target.

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38 S.M.H.Yeo, "*Self-Defence: from Viro to Zecevic*", (1988) 4 Australian Bar Review 251 at p. 255.

39 [1983] 2 V.C.R. 449. This case will be discussed in detail later in this chapter.

6.6.1 The issue of a pre-emptive strike against a passive deceased

The question now is whether in reference to the words "was about to be made" in the *Viro* formulation a direction on self-defence should be left to the jury in a case where the accused's pre-emptive strike was against a deceased who has not, at the time he was killed, been behaving aggressively. An example of this would be a case of a battered woman killing her partner at the time when he was asleep.

To say that the formulation presupposes this kind of pre-emptive action would rather be a liberal interpretation of Mason. C.J.'s formulations. Such an argument has not been so far been put forward in any case of battered woman in Australia. The fact is, the six formulations in *Viro v. The Queen* intend only to entertain cases where the claimant of self-defence is confronted with direct aggression from the attacker. The case where someone kills in anticipation of a serious attack was not a point of discussion in the case of *Viro v. The Queen.* In essence, the directives set out in *Viro v. The Queen* have not been favourable to a battered woman's claim of self-defence.

6.7 THE PROPOSITIONS IN *VIRO v. THE QUEEN* IN THE CASE OF *MORGAN v. COLMAN*[40]

One of the difficulties in Mason C.J.'s formulations in *Viro v. The Queen* is that the language in which they are framed has not been easy for juries to understand. In the South Australian Supreme Court's decision in *Morgan v. Colman*[41] Mitchell A.C.J. expressed his concern on this matter when he said:

"We are, of course, bound by the High Court and, more particularly, by the judgement of Mason J. in Viro's case, but, with unfeigned respect to that learned Judge and to the Alberta Court of Appeal, I venture to suggest that the language in which the rules are formulated by them is more appropriate for communication with other judges than for direct incorporation, unchanged, into a workaday summing-up for the instruction and guidance of a jury, or into a set of rules by which courts of summary jurisdiction direct themselves."[42]

The judge went on to paraphrase Mason C.J.'s proposition, incorporated into it also the principle of self-defence derived from the Privy Council's decision in *Palmer v. R.*[43] Eight propositions were made for that purpose but it is the sixth pronouncement which is of particular importance in the present discussion. Proposition six (d) says:

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40 [1981] 27 S.A.S.R. 334.

41 *Ibid.*

42 *Ibid.*, at p. 335.

43 [1971] A.C. 814.

"But it is the nature of things that certain sorts of situations in which violence erupts will tend to recur, and accordingly, the application of the general principle to those situations has given rise to some practical rules which are worth restating-

(d) A person who, according to the circumstances as he understands them, genuinely believes that he is threatened with an attack, is not obliged to wait until the attack begins. A person so threatened may use reasonable measures to make the situation safe, and he does not act unlawfully merely because he forestalls or tries to forestall the attack before it has begun."[44]

This pronouncement has been more dramatic in permitting a pre-emptive strike against a threatened attack. If proposition (1) in *Viro v. The Queen* suggested that the defence of self-defence is for a person whose life and bodily integrity was violated or about to be violated, the proposition in *Morgan v. Colman* goes further and suggests that even in a situation where no real attack was threatened, a person can still take reasonable measures to make himself or herself safe on the condition that he genuinely believed that his life was in danger. If a person genuinely believed that he was "threatened by an attack", that in itself is sufficient justification for the taking of self-defensive action. The dictum, also made it clear that an accused is under no obligation to wait for the attack to really get under way.

This suggests that a person will be allowed to take action in anticipation of an attack. It would also mean that where a person genuinely believes that he or she will be attacked in future, a plea of self-defence will not be rejected even if the repelling force was employed in the absence of any real threat to his or her life. The situation seems to fit well with the case of a battered woman.

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44 *Morgan v. Colman*, *supra*, fn. 40 at p. 336-337.

The pronouncement in *Morgan v. Colman* provides comfort for an accused person whose defensive action was made only in anticipation of an attack from someone. It has to be confirmed, however, whether this pronouncement would allow a consideration of self-defence defence in cases involving murder. Could a battered woman, killing at a time when there was no actual threat to her life, benefit from the judgement of Mitchell A.C.J. in her claim of self-defence? What is clear is that the pronouncement under discussion was not intended for cases involving murder. This is due to the fact that the case of *Morgan v. Colman* itself was not one involving a charge of murder. Mitchell A.C.J. acknowledged this fact when he said:

"I accordingly take the liberty of restating what I conceive to be the substance of the relevant *Viro* rules, adapted for the consideration of juries and courts of summary jurisdiction *in cases other than murder*, and of marshaling with them similar rules applicable to escape from unlawful imprisonment."[45]

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45 *Morgan v. Colman, ibid.*, at p. 335-336. (Emphasis added)

6.8 THE CASE OF *R. v. LANE*[46]

In this case, the Supreme Court of Victoria dealt with an issue where a person killed his homosexual partner after the latter had gone on the rampage, destroying furniture in the accused's house. The accused hit the deceased with a champagne bottle, without any cogent proof that his life was at that time immediately in danger. The issue in this case was whether the accused was entitled to the defence of self-defence.

At the trial, counsel for the accused relied on the defences of self-defence and provocation. The trial judge refused to leave self-defence to the jury, taking the view that the accused could not be said to have reasonably believed that at the time of the killing he was confronted with an unlawful attack or that an unlawful attack was about to be made upon him. The trial judge said: "the jury could not entertain any reasonable doubt on whether, at the actual time of the killing the accused reasonably believed, in the *Viro* sense, that an unlawful attack was being made or was about to be made on him, and that that attack threatened him with death or serious bodily harm".[47]

Murphy J., in delivering his judgement in the Supreme Court of Victoria, concluded that the behaviour of the deceased was such that it could be accepted that the accused believed that his life or bodily integrity was about to be seriously injured. The judgement included the following passage:

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46 *Supra*, fn. 39. This case was decided nearly two years after the case of *Morgan v. Colman.*

47 *Ibid.*, at p. 449.

"In the present case, I do not think that the applicant had to wait until the deceased was in the act of committing mayhem before he took physical steps to prevent the deceased doing so. The real question in the case, as I see it, may have been whether the jury was satisfied beyond reasonable doubt that the steps which the applicant took to protect himself were not reasonably proportionate to the danger which the applicant believed he faced: see Mason, J. in Viro v R. (1978), 141 C.L.R. 88, at p. 147."[48]

6.8.1 The effect of *R. v. Lane* on battered women's cases

A glance at the judgement in *R. v. Lane* seems to give the impression that the law is favouring the battered woman's claim of self-defence. It necessarily extends the words "was about to be made" in the *Viro* formulation to cases where no actual attack was threatened. Nevertheless, a detailed analysis of the decision suggests a different conclusion. The decision may not be as helpful as it was first thought when it is looked at in this way. First of all, it has to be remembered that there are two situations in which a person may exercise what he thinks as defensive force against what he interprets as an unlawful attack about to be inflicted upon him. Firstly, an accused might use defensive force against a person who has already acted violently. The deceased may have destroyed property belonging to the accused or, perhaps assaulted someone. The point, though, is that even though the deceased has behaved violently, it may not be absolutely clear whether the life or bodily security of the accused will ultimately be endangered. Hence if the accused believes that his or her life at that stage had already been immediately threatened, his defensive act will be tantamount to a pre-emptive strike against a purported attacker who had already been physically acting violently in front of the accused even though no direct assault has

48 *Ibid.*, at p. 456-457.

yet been made against him. The facts in the case of *R. v. Lane* provide a good example of this sort of situation.

Secondly, an accused might exercise what he believes to be his or her right of self-defence against a person who is not behaving violently at the time, but who has, on many occasions in the past, assaulted the accused and caused severe bodily injury. The deceased might also on many occasions have threatened the accused with death. The typical case of a battered woman is an example of this second situation. In the instant case, if the accused took into consideration the history of her relationship with her partner, and also took into account his character, she might reasonably have believed that her life was in immediate danger. Hence if she reacted by killing him, the killing could be said to amount to a pre-emptive strike against a person who at the time of the killing had not been acting violently but who had a history of violent behaviour directed against her.

Returning now to the judgement in *R. v. Lane*, what is certain is that the expansion of the words "was about to be made" is confined only to a case of the sort suggested in the first example above. This means that the law allows an accused to take some action for the protection of his life against someone who has already been acting violently though not yet directly affecting his own life. It is clear, though, that in the case of a person who kills someone who has not been physically violent, there will be little comfort in the judgement in *R. v. Lane*. *R. v. Lane*, therefore, provides little assistance for the battered woman who seeks to plead self-defence.

6.9 THE CASE OF *R. v. WALDEN*[49]

A similar judgment was also handed down in the New South Wales Court of Appeal in the case of *R. v. Walden*, which was decided some three years after *R. v. Lane*. The facts of the case indicate that the appellant exercised her right of self-defence at the time when the deceased was about to attack her. It was shown in court that the appellant killed the deceased when the latter was moving towards her with his arms swinging in what was looked as an attempt to attack her. The appellant, believing that her life was at that moment threatened by the deceased's behaviour, fired a shot which proved to be fatal, even though in her unsworn statement she claimed that it was not intended to kill the deceased but only to frighten him.

The main issue in the Court of Appeal was whether the trial judge was right in construing the *Viro* formulation to allow self-defence only when the attack purported to be made threatened death or serious bodily harm to the appellant. Street C.J. did not think that the formulation should be limited to cases in which the accused was confronted with a murderous attack. A person could also be entitled to a self-defence plea even if the attack which she believed to be made against her was of a less serious nature.

The relevance of this decision to the issue of "imminent attack" is that, as in the case of *R. v. Lane*, this case also deals with an incident where the appellant was confronted with a potentially violent act from a person (in this case the deceased) who had already been acting violently or at least who had already attempted to act violently against her. The judgement does not deal with the issue of a defensive act directed against a person who had not behaved aggressively, and thus it leaves open

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49 [1986]19 A.Crim.R. 444.

the question of whether *Viro* formulation would allow a battered woman to plead self-defence.

6.10 THE AUSTRALIAN HIGH COURT'S CASE OF *FADIL ZECEVIC*[50]

The propositions laid down by Mason C.J. in *Viro v. The Queen*[51] were to be extensively discussed, seven years after their formulation, in the High Court of Australia's decision in *Fadil Zecevic*. The majority in this case concluded that the law had not developed as had originally been intended and that it therefore required to be reformulated.

One of the most important results of this reformulation in *Zecevic* is that the stringent test of imminence has been replaced by the requirement that the accused's purported defensive action be necessary in the circumstances. The corollary of this seems to be that even if the attack - which the accused believed would be made against him - was not immediately threatening, the accused's defensive conduct would be accepted if he believed, and believed reasonably, that it was necessary for the protection of his life. Wilson, Dawson and Toohey JJ., in the majority judgement asserted:

"It is apparent, we think, from the difficulties which appear to have been experienced in the application of Viro, that there is wisdom in the observation of the Privy Council in Palmer that an explanation of the law of self-defence requires no set of words or formula. The question to be asked in the end is quite simple. It is whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did. If he had that belief and there were reasonable grounds for it, and

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50 (1986-1987) 25 A.Crim.R. 163, (1987) 162 C.L.R. 654.

51 *Supra*, fn. 33.

the jury is left reasonable doubt about that matter, then he is entitled for an acquittal."[52]

The occasion in which a defence of self-defence would be rejected was further explained in these terms:

" If the response of the accused goes beyond what he believed to be necessary to defend himself or there were no reasonable grounds for a belief on his part that the response was necessary in defence of himself, then the occasion will not have been one which would support the plea of self -defence."[53]

The judgement recommended that the only obstacle to a successful claim of self-defence should be the absence of reasonable belief in the necessity to defend or the fact that the defensive force employed went beyond what the accused believed to be necessary. It appears, then, that whether or not the danger threatening the accused's life is imminent is not the principal issue. This new conception of self-defence, viewed in the context of the battered woman issue, is a positive development. At least, the difficulty of complying with the "immediate threat" requirement (which in most cases is impossible for the battered woman, because the killing occurs at a time when there is no aggression on the part of the deceased) is eased by the requirement of necessity in the killing.[54]

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52 *Fadil Zecevic*, *supra*, fn. 50 at p. 173-174.

53 *Fadil Zecevic*, *ibid.*, at p. 174.

54 Brennan J. in his separate judgement in this case said:
"I agree with Wilson, Dowson and Toohey JJ. that the ultimate question for the jury in a case where the evidence discloses a possible occasion of self-defence is "whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did."
Fadil Zecevic, *ibid.*, at p. 177.
In one commentary it has been said:
"The reformulation of self-defence by the majority of the High Court in Zecevic may avoid the difficulties faced by such offenders in satisfying the imminence requirement. The

6.11 THE CASE OF *ZANKER v. VARTZOKAS*[55]

Not very long after *Zecevic* was decided, the South Australian Supreme Court extended the concept of "imminence" in the case of *Zanker v. Vartzokas*. In this case, a young woman accepted a lift from the defendant, who, once she was in the vehicle, offered her money for sexual favours. She rejected this offer. The defendant then said, "I am going to take you to my mate's house. He will really fix you up." The threat in the circumstances put her in such fear that she opened the door and leapt out on to the roadside. She suffered bodily injury as a result.

The main issue in this case was whether the statement by the defendant to have the woman "fixed up" was serious enough to constitute a threat and whether the threat was imminent enough so as to have him be charged with assault occasioning bodily injury. This argument was rejected in the magistrates court on the basis that there was no fear of immediate violence on the part of the woman. The South Australian Supreme Court, by contrast, decided that the threat did cause the woman to fear for immediate harm, despite the fact that she did not know for certain when and how would the harm be inflicted against her. A threat of such a nature was thus considered to be serious enough to enable the woman to take necessary action to defend her life.

This decision in the South Australian Supreme Court was another example of a liberal interpretation of the word "imminence". Even though the case did not involve a claim of self-defence, what is important is the court's decision that a mere

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proposed test does not specifically require a threat of immediate harm but instead focuses on the necessity of the accused's response in the circumstances."
A.E. Sheehy, J. Stubbs and J. Tolmie, "*Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations*" (1992) 16 Crim.L.J. 369 at p. 373.

55 (1988) 34 A.Crim.R 11.

pronouncement of a threat will be sufficient to make a person to believe that his or her life and bodily integrity is in serious danger.

6.12 THE TEST OF "IMMINENCE": A RECAPITULATION

The decision in *Viro v. The Queen*[56] substantially advanced the modern law of self-defence in Australian criminal law against a background of a traditional requirement of imminence as one of the conditions of a successful claim of self-defence. The case was also known for its controversial formulations intended to be made as a guidance to the trial judges in a case involving a claim of self-defence. The formulations were indeed referred to in most cases subsequent to *Viro*, but only for the later courts to find their shortcomings.

Before the law was reformulated by the High Court case of *Zecevic*,[57] the propositions in *Viro* had been discussed in a line of subsequent cases.[58] Reference has already been made to the cases of *Morgan v. Colman*[59] and *R. v. Lane*.[60] In the former case, Wells J. in the Supreme Court of South Australia had paraphrased the law and in doing so concluded that the accused's claim of self-defence should be considered despite the fact that he or she acted to forestall the attack before it has begun. In the later case, Murphy J. in the Supreme Court of Victoria - in having to decide a case where the accused killed the deceased when he believed that his life was in danger from the deceased's strange behaviour - decided that one does not have to wait until one's life is immediately threatened before attempting to forestall the threat; a judgement which accorded with the approach taken in *Morgan v. Colman*.

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56 *Supra*, fn. 33.

57 *Supra*, fn. 50.

58 For example in the case of *McManus* (1985) 2 NSWLR 448 and *Lawson and Forsyth* (1985) 18 A Crim R 360.

59 *Supra*, fn. 40.

60 *Supra*, fn. 39.

The propositions laid down in *Viro v. The Queen* were ultimately refined in the Australian High Court's case of *Fadil Zecevic*. The main argument for abandoning the propositions was that they caused severe difficulties to the trial judges and juries even though the essence of the concept was still claimed to be acceptable.[61] The result of this refinement essentially changed the nature of a successful claim of self-defence. If in *Viro v. The Queen*, it was required that the attack should actually have been launched, the new conception was that it all depended on whether or not the accused reasonably believed[62] that it was necessary, for his self protection, for him to respond. This new approach clearly offers the battered woman a better chance of having her case considered as one of self-defence.

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61 Mason C.J. in his judgement in the case of *Fadil Zecevic* stated: "I still believe that the doctrine enunciated in the case of *Howe* and *Viro* expresses a concept of self-defence which best accords with acceptable standards of culpability, so that an accused whose only error is that he lacks reasonable grounds for his believe that the degree of force was necessary for his self-defence is guilty of manslaughter, not murder."
Fadil Zecevic, *supra*, fn. 50 at p. 167-168.

62 It has to be noted that the word "reasonable" here means reasonable in the circumstances in which the accused found himself.

CASES OF THE BATTERED WOMAN SYNDROME IN AUSTRALIAN COURTS

The discussion above has focused mainly on cases prior to the introduction of the theory of battered woman syndrome in the Australian courts. It could be concluded at this stage of the discussion that the development of the law on self-defence in the Australian courts - particularly with regards to the requirement of "imminence of the attack" - has been positively in favour of a person whose claim of self-defence could otherwise be disregarded for having exercised the defence when no immediate harm was threatening his life and bodily integrity. By virtue of the cases of *Morgan v. Colman*, *R. v. Lane* and, most importantly, *Fadil Zecevic*, an accused would be successful in his plea of self-defence even if he acted at a time when there was no immediate threat to his life. In the first two of these cases, the words "the attack is made or about to be made" in the *Viro* formulation was leniently interpreted and in *Zecevic*, the formulation itself has been replaced with the requirement of the necessity for the defensive act.

In the following sections we shall examine how these changes affected cases in which the battered woman syndrome was at issue. The first case of this kind is that of *Rujanjic and Kontinnen*.[63]

63 (1991) 53 A.Crim.R 362.

6.13 THE CASE OF *OLGA RUJANJIC AND ERIIKA KONTINNEN*[64]

This case involved two appellants, Rujanjic and Kontinnen, who were convicted by the South Australian Supreme Court of false imprisonment and causing grievous bodily harm. Both of the appellants shared a particularly violent domestic relationship with one Hill, who designated them No.1 and No. 2. Both were forced into prostitution and were treated as slaves at home. Most importantly, for the purpose of the present discussion of battered woman syndrome, that both the appellants lived under constant fear of Hill - fear which, as one psychiatrist explained in the trial court, rendered them helpless and unable to make their own decisions. The relationship between the appellants and Hill was therefore one of dominance and obedience.

The incident began when all three protagonists lured the victim, to their house so that Hill might violently interrogate her regarding some allegedly stolen property. The victim claimed that she was detained against her will and that she was also the subject of ill treatment and violence by the appellants and Hill. Although the appellants admitted being parties to deceiving her into going to the house, the jury was told that there was no common plan involving the imprisonment or violence and that Hill's assault on the victim was not anticipated by the others. This was the primary defence forwarded by the appellants in the trial court. In the alternative, it was contended on their behalf that their wills were overborne by fear of Hill's violence and that they acted under duress. These arguments however were both rejected in the trial court and both of the appellants were convicted of unlawful imprisonment and unlawful assault.

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64 *Ibid.*

The specific grounds of appeal were firstly, that the verdicts were unsafe and unsatisfactory, secondly, and more importantly was that the judge had wrongly refused to admit certain specific expert evidence. The court rejected the first ground of appeal, stating that it was of the view that the claim of duress was greatly weakened by the fact that the appellants did not claim to have participated out of fear in a plan involving imprisonment and violence, but had denied participation altogether. In this regard the court said: "Their credibility must have been severely weakened in the eyes of the jury by what were seen to be false denials and that must have greatly influences the jury's assessment of the story that, to the extent that they co-operated with Hill, they did so only out of fear."[65]

Having rejected the first ground of appeal, King C.J. in the Court of Appeal went on to discuss the second issue related to the admissibility of expert evidence on the battered woman syndrome. In his observations he referred to various authorities on the syndrome, particularly to the works of American and Canadian commentators.[66] On this he stated:

"It emerges from the literature that methodological studies by trained psychologist of situations of domestic violence have revealed typical patterns of behaviour on the part of the male batterer and the female victim, and typical responses on the part of the female victim. It has been revealed, so it appears, that woman who have suffered habitual domestic violence are typically affected psychologically to the extent that

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65 *Rujanjic and Kontinnen, ibid.*, at p. 365.

66 The judge referred to the work of D. J. Brodsky, "*Educating Juries: The Battered Woman Defence in Canada.*" 25 No3 Alberta Law Review 461. A. E. Thar, "*The Admissibility of Expert Testimony on Battered Wife Syndrome: An Evidentiary Analysis*" 77 No 3 Northwestern University Law Review 348.
The woks by Dr. L. Walker, "*The Battered Woman*" (1979) and "*The Battered Woman Syndrome*" (1984).

their reactions and responses differ from those which might be expected by persons who lack the advantage of an acquaintance with the result of those study.

Repeated acts of violence, alternating very often with phases of kindness and loving behaviour, commonly leave the battered woman in a psychological condition described as "learned helplessness". She cannot predict or control the occurrence of acute outbreaks of violence and often clings to the hope that the kind and loving phases will become the norm. This is often reinforced by financial dependance, children and feelings of guilt. The battered woman rarely seeks outside helps because of fear of further violence. It is not uncommon for such women to experience feelings for their mate which they describe as love. There is often an all pervasive feeling that it is impossible to escape the dominance and violence of the mate. There is a sense of constant fear with a perceived inability to escape the situation."[67]

After explaining the basic insights of the theory, it was decided that the exclusion of the evidence on the battered woman syndrome essentially vitiated the whole trial. The judge asserted:

"It seems to me that a just judgement of the actions of women in those situations requires that the court or jury have the benefit of the insights which have been gained."[68]

The Court of Appeal finally concluded that evidence on the battered woman syndrome had wrongly been overlooked. A new trial was ordered, the judge

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67 *Rujanjic and Kontinnen*, *supra*, fn. 63 at p. 366.

68 *Ibid.*, at p. 369.

stressing the importance of the theory and the role it could have played in determining the appellant's criminal liability.

This decision was acclaimed as the turning point in the history of battered woman in Australian courts, in that for the first time the theory of the battered woman syndrome was accepted. It has to be noted however, at this stage, that the theory supported the appellants claim of the defence of duress, which means, as a result of the battering relationship, the appellants became helpless, experienced low self-esteem, feel psychologically unwell and had their wills were overborne by fear of Hill's violence. Thus even though the case under discussion admitted the tenability of the theory of the battered woman syndrome, a question still remains - might it be accepted in a more serious charge, one of murder, as it was the case in Canada? On this question it is revealing to refer to the judgement of King C.J. when he said:

"I can see no distinction in principle between the admission of expert evidence of the battered woman syndrome on issues of self-defence and provocation and on the issue of duress."[69]

Clearly King C.J. envisaged no difficulty in admitting the theory to support a battered woman case where it involved the claim of self-defence or provocation. Nevertheless, the question is to what extent would the judgement as a whole, impress judges in future cases involving battered woman claiming self-defence and provocation. Few decisions subsequent to *Rujanjic and Kontinnen*, elucidate the issue.

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69 *Ibid.*, at p. 370.

6.14 THE CASE OF *KONTINNEN*[70]

The defendant, Erica Kontinnen, was one of the appellants in the earlier case discussed above. She was charged with murdering Ian Hill, her de facto spouse. The defendant did not remember firing the shot but she remembered seeing Hill lying face down and bleeding on the ground, which made her conclude that she must have shot him.

The defence of self-defence and provocation were both put to the jury. The basis of these defences was Hill's long term abuse of the defendant, of his other de facto spouse, Rujanjic, and of her child. The defences were also supported by the fact that during the night in question the deceased had threatened to kill both women and the child. In support of the self-defence argument, evidence on the battered woman syndrome was given by a clinical psychiatrist and by a clinical forensic psychologist. By virtue of the judgement of the Full Court of the South Australian Court of Criminal Appeal in *Rujanjic and Kontinnen*, the trial court found no difficulty in admitting the theory, which purported to explain the subjective view of Kontinnen as to the necessity of killing Hill on the night in question and also to explain the reasonableness of her claimed apprehension of death or serious bodily harm. The defendant was acquitted of murdering Hill.

If the theory of battered woman syndrome helped the two appellants in *Rujanjic and Kontinnen* on the issue of duress, the present case goes further by admitting the theory in relation to the defence of self-defence in a case of murder. The decision of Legoe J. in the Supreme Court of South Australia thus translated into reality the judgement of the Full Court in *Rujanjic and Kontinnen*, where the judges

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70 (1992) 16 Crim. L J. 360.

were unanimous in their view that the evidence proffered would also be acceptable to the defence of self-defence and provocation.

6.15 THE CASE OF *HICKEY*[71]

The accused in this case was charged with the murder of her de facto husband. It was asserted in the trial that she had suffered considerably during her relationship with the deceased: severe beatings were not an uncommon experience - indeed these happened almost daily. Evidence was also led that she was treated for a suspected miscarriage after being kicked by the deceased. The deceased's violent acts were not only directed at the accused but also involved the couple's children.

Because of her miserable life with the deceased, the accused decided to separate from him. She obtained a Domestic Violence Order against the deceased, restraining him from harassing her, but this order was ignored and the violence continued as before. On the day of the offence, the accused had agreed to meet the deceased so that he could see their children. They had a drink together and then returned to his house. The deceased wanted the children to stay for a night in his house but this was not agreed by the accused. They then became involved in an argument during which the accused was assaulted and seized by the throat. When he stopped acting violently and was seated on the bed with his back towards her, the accused grabbed a knife and struck the deceased in the chest. He died shortly afterwards from the stab wound.

The defence of self-defence was raised in the trial. The accused claimed that she was in a state of rage and fear over what the deceased had just done to her when the stabbing occurred. She also claimed to be overwhelmingly worried over the safety of her children, fearing that they might be seriously threatened in future by the deceased's violence. In addition to this, psychiatric evidence was also produced as to the battered woman syndrome; the accused was said to have been living in the state

71 (1992) 16 Crim.L.J. 271.

of "learned helplessness", as described in the theory. The court admitted this evidence, and, as a result, the accused was acquitted of murder.

6.16 SUMMARY

The unanimous decision by the South Australian Court of Criminal Appeal in *Rujanjic and Kontinnen*[72] was said to be the first case where the theory of the battered woman syndrome was accepted in an Australian court. It must be borne in mind that the theory was used in relation to the defence of duress in a case not involving murder and not, as in the Canadian Supreme Court's case of *R. v. Lavallee*,[73] in the context of the defence of self-defence. The judgement of King C.J., however, permits the admissibility of the theory in support of the claim of self-defence in a murder case. Hence the way was cleared for its use in subsequent cases..

Ten months after the decision in *Rujanjic and Kontinnen*, the theory was successfully introduced in support of an accused's claim of self-defence in a charge of murder. The theory seems to have been accepted without much argument simply because the Full Court of the South Australian Supreme Court had given the green light in its previous decision. And not very long after *Kontinnen's* case was decided, the theory of "learned helplessness", which was one of the two ingredients constituting the theory of the battered woman syndrome, was held to be a reason for the accused to have killed and therefore supported the claim of self-defence. As in *Kontinnen*, in *Hickey*, the theory was accepted without any serious opposition.

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72 *Supra*, fn. 63.

73 [1990] 1 S.C.R. 852.

6.17 THE CASE OF *R. v. HELEN PATRICIA SECRETARY*[74]

6.17.1 The facts of the case

The accused in this case, Helen Patricia Secretary, was charged with murdering her husband. They had been married for eleven years and the last eight years of the relationship had been tortured ones for her. She had been constantly verbally, mentally and physically abused by the deceased. Approximately one month before the killing, the deceased had been more violent and had beaten the accused to the extent that neighbours had reported the matter to the police.

The assaults then intensified, leading her to leave the household and obtained a Restraining Order against the deceased. She spent a week at a women's shelter and then returned to her home. The deceased neglected the order and moved back to the house, staying with the accused. In one incident, the deceased assaulted her sister and her child. This was reported to the police, but apparently no action was taken.

The day before the shooting, the deceased assaulted her by threatening her with a knife. The phone cord in the house was also cut off by the deceased in what seemed to be his attempt to prevent the accused to call the police. There were also various threats made, the accused being told by the deceased that he would kill her on waking up the next morning.

The accused took this last threat seriously. Two reasons probably contributed to this apprehension; firstly, the deceased's aggressive conduct that day and secondly, his violent behaviour over the previous weeks. The accused, in fearing for

74 (1996) 107 N.T.R. (n.p. Lexis transcript)

her life, loaded a gun which was in the back of her car and then shot at the deceased, who at that time was asleep in the home.

In the trial court the defence of self-defence was not left to the jury. Counsel for the accused applied under section 408 (1) of the Criminal Code that the question of law which was the subject of the ruling be reserved for the consideration of the Court of Criminal Appeal. The case was then brought to the Court of Criminal Appeal and the issue to be decided was whether the trial judge was correct in not leaving the defence of self-defence to the jury in the circumstances in this case.[75]

The case was tried in the Northern Territory of Australia, a Code state. The relevant section of the Criminal Code, s. 28 states:

> "In the circumstances following, the application of force that will or is likely to kill or cause grievous harm is justified provided it is not unnecessary force:
>
> (f) in the case of any person when acting in self-defence or in the defence of another, where the nature of the assault being defended is such as to cause the person using the force reasonable apprehension that death or grievous harm will result.

In the Court of Appeal Mildren J. stated that by virtue of this provision three elements of self-defence should be satisfied by an accused:

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75 It was reported in this case that the accused was re-arraigned at the request of the defence and pleaded not guilty to the murder of the deceased but guilty to manslaughter by reason of provocation. No conviction was formally recorded in the trial court and judgement was postponed under section 408 (2) of the Criminal Code until the question reserved had been considered by the Court of Criminal Appeal.
R. v. Helen Patricia Secretary, ibid.

1. the accused must be acting in defence of herself from an assault by the deceased;

2. the assault must have caused the accused reasonable apprehension that death or grievous harm would result to her;

3. the force used to defend herself must not be unnecessary force.

Another issue that calls for clarification at this point is the meaning of the word "assault" as intended by section 28 (f) of the Code. This was in fact discussed in the court, which referred to section 187 of the Code. The relevant sub-sections define assault as follows:

(a) the direct or indirect application of force to a person without his consent or with his consent if the consent is obtained by force or by means of menaces of any kind or by fear of bodily harm or by means of false and fraudulent representation as to the nature of the act or by personation; or

(b) the attempted or threatened application of such force where the person attempting or threatening it has an actual or apparent present ability to effect his purpose and the purpose is evidenced by bodily harm movement or threatening words, other than the application of force -

Counsel for the prosecution submitted that to establish an assault in this case, the following elements must be present:

1. a threatened application of force by the deceased to the accused without her consent;

2. the deceased, at the relevant time, had an actual or apparent present ability to effect his purpose;

3. the purpose was evidenced at the relevant time by bodily movement or threatening words.

The prosecution's main contention was thus that as the deceased was asleep at the time he was killed, the accused could not have been acting in self-defence from an assault by the deceased. Furthermore, although there was evidence suggesting that the deceased had behaved violently towards the accused, at the time of the killing the deceased was not doing anything that fell within the definition of "assault" as defined in the Code. The deceased simply did not have the "actual or apparent present ability to effect his purpose" as stated in the Code. In other words, the prosecution intended to establish that the killing was committed at a time when the deceased has not been assaulting the accused, and therefore the question of self-defence was irrelevant.

At this point it has to be noted that the prosecution was merely asserting that the traditional conception of self-defence requires that an assault to be actually in existence before one can reasonably exercise force in defence of life. The implication of this is that when the accused kills in anticipation of an assault from the deceased, this simply does not fall within the conception of self-defence but remains murder.

6.17.2 The accused's case

The essence of the accused's argument was that section 28 (f) does not put a time limit on an act done in self-defence. Her submission was that the evidence established one long assault lasting for a considerable part of the final day and which had not ceased at the time of the deceased's death. In this context the court referred to section 310 (1) of the Code:

"In an indictment against a person for an assault the accused person may be charged and proceeded against notwithstanding that such assault is alleged to be constituted by a number of assaults provided they were committed on the same person in the prosecution of a single purpose or at about the same time."

This provision provides that one may be charged with an assault notwithstanding the fact that it has been committed in a series of violent acts, on the condition that such assault was made against the same person, in the prosecution of a single purpose and at about the same time. Applying it in the present case, the deceased could be said to have committed an assault against Mrs. Secretary for the reason that he had consistently assaulting and abusing her for the purpose of causing her serious bodily injury and in a number of occasions had threatened her life. The deceased was therefore assaulting her by virtue of this provision, and her act of shooting him was an acceptable act of self-defence.

6.17.3 The decision of the Supreme Court of the Northern Territory: The issue of "actual or present ability to effect his purpose"

The primary issue which was addressed by Mildren J. in his judgement in the Supreme Court was the question as to whether the deceased could be said to have been assaulting the accused despite the fact that he was asleep when the fatal shot was fired. Considerable attention was paid to section 187 (b) of the Code, in particular, to the meaning of the word "assault" when it was stipulated that the person intended to assault, in this case the deceased, must have "actual or apparent ability to effect his purpose". In this context, the primary issue was whether the deceased really did have the actual and apparent ability to make good his threat to kill the accused?

Two issues were elaborated in this part of the judgement. Firstly, it was decided that the words "apparent present ability" had to be construed by reference to the threat to which the threatening words relate. Therefore, if the case was one of the threatened application of force, it must be evident from the facts known at the time the threat was made, that when the threat was to be carried out the person making the threat would have the ability to carry out the threat. Secondly, the judgement emphasised the issue of the "purpose" of the deceased. For a person to be said to have the actual or apparent ability to carry out his death threat, his purpose to kill must be unambiguous. It must be made clear, from the evidence available in court, that the purpose of the deceased must be clear that he intended to kill or to cause severe injury to the accused.

In this case, if a question is asked, what was the ultimate purpose aimed at by the deceased? It seems clear from the appalling history of violence suffered by the accused that the deceased intended to kill or at least to inflict serious bodily injury upon his partner. Moreover, it is clear, on the basis of his past conduct, that he was quite capable of doing this. Thus, the deceased may be said to have had an actual or present ability to effect his purpose to kill the accused thus satisfying the requirements of section 187 (b) of the Code.

6.17.4 The issue of the completion of the assault: section 28 (f)

Section 28 (f) of the Code provides that the outcome in relation to self-defence depends on whether or not at the time of the employment of the defensive force, the accused was defending the assault from the purported attacker.[76] After concluding that the deceased might have had the ability to effect his purpose, that is, to kill the accused, the issue was whether or not the deceased's assault was completed at the time when the accused fired the fatal shot. The Supreme Court was of the view that if the assault was completed by the time the deceased fell asleep, the accused could not have been defending an already-existing assault but a different one - an anticipated assault which she feared may occur in the future. On the other hand, if the assault was still persisting, the defensive force used by the accused would be a justifiable act of self-defence as intended by the Code, despite the fact that the deceased was asleep.

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76 It is to be pointed out again that the Code says " in the case of any person when acting in self-defence or in the defence of another, where the nature of the *assault being defended* is such . . . ." The words "the assault being defended" suggest that a valid claim of self-defence could only be made in cases where the claimant of the defence is defending himself against an assault which is physically in progress.

In delivering his judgement Mildren J. said that it was open to the jury to conclude that the assault was still not completed. This would amount to saying that the court at this point considered that the threat made by the deceased not very long before he slept was still continuing, and still a murderous one, and that the accused had the right to take necessary steps for self-defence, in order to ward off the threat. It would be open to her to do this in whatever way she thought fit to save her life - even if she acted at a time when the deceased was in bed, passive, and not behaving violently. The Supreme Court regarded the deceased in his sleep as "temporarily physically unable to carry out his threat". When he awoke, however, he would still be a dangerous person capable of effectively implementing the threat he has made. In this respect, it could be maintained that the Supreme Court of The Northern Territory effectively went beyond the traditional interpretation of the requirement of "imminence".

It is apparent that the Court of Appeal concluded that section 28 (f) of the Code did not envisage the imminence of the threat as one of the requirements of a successful plea of self-defence. The law thus seems to be that a plea of self-defence could be made available in cases where the purported attacker, has the apparent ability to carry out his ultimate purpose and where that ultimate purpose itself is a clear one, that is, to cause severe injury or to kill. (This could be established by looking at the history of the relationship between the parties). In addition to this requirement, the assault must not have been completed at the time of the employment of the defensive force. If these two requirements are met, by virtue of the decision in *Helen Patricia Secretary*, a claim of self-defence would be left to the jury even if repelling force is resorted to in the absence of an actual attack.

6.17.5 Some observations

Two sections in the Criminal Code of the Northern Territory of Australia will be directly relevant in cases of self-defence. Section 28 (f) deals with the law on self-defence itself and section 187 (b) of the Code necessarily clarifies the meaning of the word assault which is stated in section 28 (f). Section 28 (f) requires that the assault intended to be defended against be presently existing and that the accused, based on the assault he or she faces, reasonably apprehends that death or grievous bodily harm will result from the assault.

The court's task then, was to determine the meaning of the word assault as well as to decide the beginning and the completion of the assault. In this case, an assault was said to have occurred by virtue of the threat made, and by virtue of the fact that the deceased had the present and actual ability to carry out the threat. To decide whether the accused has the ability to carry out the threat the court needs to look at the history of the relationship between the two parties involved, in the present case, the deceased and the accused. The continuation of serious battering incidents in the relationship will be strong evidence supporting the view that the person who made the threat has the present and actual ability to carry out his purpose.

Perhaps the most interesting outcome of the judgement is that the court seems to differentiate between an anticipated assault which may occur in the future and the assault which has already begun but has yet to be completed. Both have specific effects on the plea of self-defence. If force is used in repelling an anticipated assault which may occur in the future, the court would probably take the view that it would not be an act of self-defence as intended by the provisions in the Code. This is probably due to the fact that the accused was only defending herself

against an anticipated assault which may or may not occur. To allow self-defence in cases of such a kind would in the end be disastrous to the law of self-defence itself. The court nevertheless took the view that the plea of self-defence could be left open for consideration by the jury if the repelling force was used against an assault which had already begun but which was temporarily halted, as, for example, in a situation where the purported attacker is asleep. The Supreme Court in this case described the person in such a situation as "temporarily physically unable to carry out his threat".[77] It is also important that the assault is not yet been completed at the time when the defensive act is done. Therefore even if the accused attacked the deceased and killed him when he was asleep, the act of killing will be within the intended meaning of the defence of self-defence in the Code, despite the fact that she was not physically and presently confronted with any violent act from the deceased.

In summary, a death threat or a threat to cause severe bodily harm will be regarded as an assault if there is sufficient evidence to suggest that the person who made the threat has the ability to carry it out. The assault is therefore, by virtue of the Code, one which may be defended against by the use of force provided that it is still persisting and there is no evidence to suggest that it has already been completed. At this point the traditional imminence requirement has been disregarded.

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77 *R. v. Helen Patricia Secretary*, *supra*, fn. 74.

6.18 THE CASE OF *R. v. HELEN PATRICIA SECRETARY*: IMPLICATIONS OF THE BATTERED WOMAN SYNDROME

Mildren J. in his judgement in *Secretary* referred to a number of cases which involved the issue of the battered woman syndrome. The Canadian cases of *R. v. Lavallee*[78] and *R. v. Whynot*[79] were compared and highlighted. After elaborating the facts of the case in *Lavallee*, the judge expressed the view that his approach to the case was in conformity with that of the judges in the Supreme Court of Canada; the threat of future conduct could amount to an assault which could be defended against in self-defence.

With regard to the case of *R. v. Whynot*, Mildren J. concluded that the Nova Scotia Court of Appeal did not characterise the threat made by the deceased as an assault. The appellant in that case, therefore, was not acting in defence against an assault which, having the act been considered so, would enable him to rely on the defence of self-defence. The Australian court stressed the point that the Nova Scotia Court of Appeal did not differentiate between the two kind of assaults which they (the Australian court) had identified. No distinction was attempted between an assault which was the result of a threat made (taking into consideration the capacity of the person who made it to realise the threat) and an anticipated assault which may or may not occur in the future. In the former, the existence of such a threat is evidence of an assault, and such assault is still continuing until it has been completed by the person who makes it or there is evidence to suggest otherwise. In saying this, the Court of Appeal implicitly disagreed with the decision in *R. v. Whynot*. Thus it is

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78 *Supra*, fn. 73.

79 (1983) 9 C.C.C. (3d) 449.

understandable that the criticism of *Whynot* expressed in *Lavallee* was cited in length in Mildren J.'s judgement.[80]

The decision in *Zecevic v. Director of Public Prosecutions*[81] was referred to in the case of *Secretary* to support the fact that in the Australian states with common law jurisdictions the law has moved away from the requirement of immediacy and tended to favour a more flexible approach. In *Zecevic*, the court decided that in determining whether or not an act was a justifiable act of self-defence, regard had to be paid to the honest and reasonable belief of the accused as to the existence of a need to defend. If on the evidence the accused honestly and reasonably believed that his life was seriously threatened, her repelling force would be acceptable for consideration of the defence of self-defence. This would be so even in the absence of any actual physical violent act from another party. Decisions of this nature were taken by the judges in the Supreme Court of the Northern Territory as justification for deviation from the old conception of self-defence, with its emphasis on the rule of imminence.

By virtue of the judgement in *R. v. Lavallee*,[82] the criticism by the Canadian Supreme Court of the judgement in *R. v. Whynot*,[83] and the pragmatic approach in the High Court of Australia in *Zecevic*, the Northern Territory Supreme Court concluded that "there is no compelling reason why, in a case such as this, the "assault

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80 Widren J. cited this part of the judgement of *R. v. Lavallee*: "The requirement imposed in Whynot that a battered woman wait until the physical assault is "underway" before her apprehensions can be validated in law would, in the words of an American court, be tantamount to sentencing her to "murder by installment": New Mexico v. Gallegos,719 P.2d 1268, at 1271, 104 N.M. 247 (C.A., 1986)."
R. v. Helen Patricia Secretary, *supra*, fn. 74.

81 *Supra*, fn. 50.

82 *Supra*, fn. 73.

83 *Supra*, fn. 79.

being defended" for the purposed of s.28 (f) of the Code, ought not to be characterised as a continuing assault constituted by threatening words uttered by the deceased immediately before he fell asleep so that, in truth, it is that assault which is being defended, not a possible assault in the future which may or may not occur, as the court in Whynot characterised it."[84] In reaching this conclusion, therefore, the court had invented a new conception where the defence of self-defence could be claimed - a threat of violence could be interpreted as an act of assault even if the person who makes the threat is not of violent character. The point is that, in the light of the history of the relationship between the two parties, the person who makes death threat must have, on the evidence produced in court, been continuously and consistently assaulting the accused. This is important as it shows that the person who makes the threat has the ability to effect his purpose and therefore falls within the meaning of "actual and present ability to effect his purpose" as stated in the Code. Thus, the defensive force employed by the accused is in actual fact an act of self-defence against an assault which has already begun and still continuing. The defender does not have to wait until the assault is in the final stage of its execution, which means the actual physical attack on the defender. The temporary physical inability to carry out the threat on the part of the purported perpertrator, does not mean that the defensive conduct is unjustifiable.

6.18.1 Is the theory of battered woman syndrome an issue in the case of *Secretary*?

One interesting point to be highlighted in the judgement of the case of *Secretary* is that despite the fact that this case involved a woman who was living with a violent husband and who had been continuously abused - which suits her well

84 *R. v. Helen Patricia Secretary*, *supra*, fn. 74.

with the newly invented theory of the battered woman syndrome - no reference to the theory seems to have been made. The Canadian case of *R. v. Lavallee*, (which was known to be the first case where the theory was accepted in the Canadian court and was widely referred to thereafter) was discussed and evidently influenced the judgement of the judges in the Court of Appeal of the Northern Territory of Australia. However, it was not particularly the theory of battered woman syndrome that was referred to by the Australian judges. Mildren J. concluded, rather, that the case of *Lavallee* was important in that its judgement accepted that a threat of future conduct could be defined as amounting to an assault that could be defended against in the act of self-defence.[85] The question is, is this the ratio of the judgement in the Canadian Supreme Court?

We must remember that the acquittal of the appellant in *R. v. Lavallee* was due in great measure to the acceptance of the theory of battered woman syndrome; in fact, the theory became the overwhelming issue from the very beginning of the trial. On appeal, the Manitoba Court of Appeal however, overturned the trial court's decision and refused to accept the validity of the theory. The issue was finally resolved when the Supreme Court of Canada reinstated the trial court's decision and approved the application of the battered woman syndrome as a mean of proving the appellant's reasonableness in her use of force in self-defence. The fundamental issue was indeed one of the battered woman syndrome.

It has to be noted here that Mildren J., as has been pointed out above, bases his judgement in the main on the interpretation of the provision in the Criminal Code of the Northern Territory of Australia. The main provision is section 28 (f) of the Code which talks about the circumstances which a person could be granted a defence of self-defence and section 187 (b) which elucidates the meaning of the word

85 *R. v. Helen Patricia Secretary, ibid.*

"assault" as mentioned in the said section. The law as stated in the Code requires that before an accused's plea of self-defence could be considered, it must be "established" that the defender is in a situation where she is defending herself against an assault and the nature of the assault is such as to cause her reasonable apprehension that her life and bodily integrity is in danger.

The issue then becomes one of whether a person (in this case the deceased) who has threatened the life of the accused and after that has fallen asleep, has already assaulted the accused for the purpose of the Code? The court decided this in the affirmative, coming to this conclusion by arguing that by looking at the history of violence between the parties the deceased had the actual and apparent present ability to effect his purpose (that is to kill the accused as he mentioned in his threat). For this reason, the court said, the death threat made by the deceased immediately before he went to sleep was a threat that falls within the definition of the word "assault" as used in section 28 (f) of the Code. Therefore the fatal shot that killed the deceased was not an act of murder but an act of self-defence.

The question now arises is whether the exculpation of the appellant (the battered woman) in *R. v. Lavallee* was based on a similar line of argument. A brief recapitulation of the main issue in *Lavallee* will thus be necessary to answer the question.

The appellant in this case was a battered woman who had been continuously beaten and abused by her common law husband. On the night the killing occurred, she shot her husband in the back of the head as he left her room. It was alleged in court that the deceased, before being shot to death, had threatened the life of the appellant. The issue then became that of whether the testimony of a psychiatrist,

testifying on the point of battered woman syndrome, should be accepted. The acceptance of this testimony allowed the court to consider the appellant's plea of self-defence, and the whole argument of the case then focused on this point.

In the judgement the Supreme Court of Canada made reference to the Canadian Criminal Code's provisions on law of self-defence. One of the most important requirements of a successful claim of self-defence stated in the Code is that the appellant, before using force in her defence, must have reasonably apprehended that the assault which was made against her was of a serious nature that could cause her death or severe bodily injury.[86] The key phrase here is "*reasonable apprehension of death or grievous bodily harm*". At this point the Canadian Supreme Court decided that the reasonableness of the appellant's conduct could only be properly evaluated by considering expert evidence on battered wife syndrome. Wilson J. in her judgement stated:

"Where evidence exists that an accused is in a battering relationship, expert testimony can assist the jury in determining whether the accused had a "reasonable" apprehension of death when she acted by explaining the heightened sensitivity of a battered woman to her partner's act. Without such testimony I am skeptical that the average fact-finder would be capable of appreciating why her subjective fear may have been reasonable in the context of the relationship. After all, the hypothetical "reasonable man" observing only the final incident may have been unlikely to recognise the batterer's threat as potentially lethal."[87]

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86 Section 34 (2) (a) of the Canadian Criminal Code states:
"Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if
(a) he causes it under *reasonable apprehension of death or grievous bodily harm* from the violence with which the assault was originally made or with which the assailant pursues his purposes."

87 *R. v. Lavallee*, *supra*, fn. 73 at p. 882.

It must be noted that the main issue discussed in *R. v. Lavallee* was the reasonableness of the accused's conduct, a matter which could only be appreciated by allowing an expert to testify on the issue of battered woman syndrome. The Supreme Court of the Northern Territory of Australia, for some reason, did not highlight this part of the judgement in its decision. It is possible that the Supreme Court of the Northern Territory did not feel that there was a need to discuss the issue of the reasonableness of the accused's defensive conduct even though, as in the Canadian Code, the provision in the Criminal Code of the Northern Territory also talks about the reasonable apprehension of the accused and her belief in the severity of the assault made against her. This approach accordingly leads to the issue of battered woman syndrome becoming unnecessary.

6.19 THE CASE OF *R. v. HELEN PATRICIA SECRETARY:* CONCLUSION

The result of the judgement in *R. v. Helen Patricia Secretary* is twofold:

Firstly, the case under discussion reveals that even though the issue of battered woman syndrome was not been brought up in argument, the accused's plea of self-defence could still be heard and considered. Throughout the judgement, the Supreme Court failed to make any reference to other Australian cases which involved the issue of battered woman syndrome. The decision of the South Australia Court of Criminal Appeal in *Rujanjic and Kontinnen* - which is the landmark decision as far as the admissibility of the theory of battered woman syndrome is concerned, was not discussed. The subsequent cases of *Kontinnen* in the Supreme Court in South Australia and the decision of the New South Wales Supreme Court in *Hickey* were similarly ignored.

The approach taken by the Supreme Court in making its decision perhaps explains the reason for this attitude. The judges' main focus in *Secretary's* case is not the requirement of the reasonableness of the accused's belief at the time of committing the act. Had this been the case, there is a possibility that expert evidence explaining the accused's state of mind would in the end have been necessary, and that would also mean that the cases mentioned above discussing the theory of battered woman syndrome would have been considered. The primary concern of the judges instead was the issue of "the nature of the assault being defended" mentioned in section 28 (f) in the Code and the definition of the word "assault" as stated in the same provision. Upon the court's being satisfied that the assault had already been made by the deceased and that the deceased had the ability to effect his purpose of

killing the accused, the repelling force used would be accepted as within the acceptable act of self-defence required in the Criminal Code of the Northern Territory.

Secondly, the fact that such a decision has been reached poses the question: is the theory of the battered woman syndrome really necessary? The Supreme Court has proved that even without considering the syndrome a battered woman who kills at the time where there is no actual attack from her partner, could still have a valid argument for the consideration of a plea of self-defence. One final question would then be asked: does this judgement signify the demise of the syndrome in court? Whether or not this is so depends on the attitude of the judges at the time of the trial, but what is certain here is that the decision in *R. v. Helen Patricia Secretary* only proves the weakness of the theory and its application in court must therefore be reconsidered.

CHAPTER SEVEN

CONCLUSION

7.1 THE DOCTRINE OF EXCESSIVE FORCE IN SELF-DEFENCE

When a person is attacked and as a result, kills or causes grievous injury to his attacker while labouring under a mistaken belief that the amount of force used in his repelling force is necessary, he may be convicted of manslaughter. This is the principle embodied in the doctrine of excessive self-defence.

Despite the fact that it has been widely supported, this doctrine has now been abolished. The approach presently prevalent in the Australian, English as well as Canadian Courts seems to require the accused's mistaken belief as to the quantum of force employed to be reasonable on both the subjective and objective view. This approach does not permit any concession in a case where one's defensive act is reasonable subjectively but, objectively viewed, unreasonable. In particular, the law now recognises no halfway house - a person who honestly but mistakenly believes that his behaviour is reasonable may still be convicted of murder if this behaviour is objectively unreasonable.

The High Court of Australia in the case of *Fadil Zecevic*[1] laid down the law that the accused's mistaken belief is now to be judged by the test of reasonableness.

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1 [1986-1987] 25 A.Crim.R 163.

However the reasonableness of the accused's mistaken action is to be judged by what is reasonably believed by the accused himself. This is a mixture of a subjective and objective approach. In a case where the jury is satisfied that this mistaken belief is subjectively and objectively reasonable, the accused's mistaken belief is then justifiable and he bears no criminal liability at all. On the contrary, in a case where the mistaken belief is found to be unreasonable, the accused is guilty of murder.

By virtue of the Privy Council's decision in *Palmer v. R.*,[2] the English courts appear to have adopted a completely objective reasonableness test in dealing with the issue of the accused's act of resistance.[3] If the jury is satisfied beyond reasonable doubt that the accused did not act in self-defence, the issue will be eliminated; on the contrary, if it is within the scope of necessary self-defence, it is a justified act and a judgement of acquittal is the only option. This approach was subsequently confirmed and adopted in the English Court of Criminal Appeal case of *R. v. McInnes.*[4]

In the controversial case of *R. v. Clegg*,[5] the accused's mistaken belief as to the amount of force required in his defence was not sufficiently dealt with. The six shots fired by the accused in what he claimed to be his act of self-defence were divided by the Law Lords into two categories namely; first, the first two shots which were accepted as being made in the exercise of the legitimate right of self-defence;

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2 [1971] 1 All ER 1077.

3 However it has been argued that with regard to the belief of the accused in the amount of force used in self-defence, the judgement of Lord Morris in *Palmer v. R.* suggests that the jury also consider the subjective belief of the accused. Thus this view holds that in considering the reasonableness of the accused's belief as to the amount of force, a subjective and objective reasonableness test is applied. A detailed explanation of this argument is provided in chapter 4 p. 141 - 145.

4 [1971] 1 All ER 295.

5 [1995] 1 All ER 334.

second, the remaining four, which were held to be unnecessary and therefore unjustified. Since it was the fourth shot which, according to an expert opinion, was the main cause of the deceased's death, the claim of self-defence was rejected. The case simply disregarded the honest but mistaken belief of the accused.

The Canadian Provincial Appeal Courts had, on many occasions, applied the middle ground principle. However, the Supreme Court of Canada in *Brisson v. The Queen*[6] (which was subsequently followed in *R. v. Gee*[7] , *R. v. Faid*[8] and *Reilly v. The Queen.*[9]) has firmly rejected the arguments in favour of the doctrine. The main reason for the Supreme Court's declining to follow the doctrine was the fact that the law of homicide in the Canadian Criminal Code has not been so defective so as to require a fundamental change of this nature. Moreover, any fundamental change to a long established and well accepted principle was thought to need the clear approval of the legislature.

Section 34 (1) of the Code which specifically deals with the defence of self-defence requires the accused to act proportionately in his defence. It is apparent from the language of the section that this proportionality requirement must be satisfied objectively. The defence of self-defence was also elaborated in section 34 (2) (a) and (b) of the Code. In this section, the law made no mention of the requirement of the proportionality test. Subsection (a) of section 34 (2) requires that the accused's belief as to the need to exercise force be satisfied under a purely objective test. Subsection (b) of the same section obliges the accused to honestly believe that his defensive act

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6 139 D.L.R. (3d) 685.

7 139 D.L.R. (3d) 587.

8 145 D.L.R. (3d) 67.

9 13 D.L.R. (4th) 161.

is necessary and that belief must be satisfied upon objective standard of reasonableness.

In considering the issue of the accused's belief under section 34 (2) (a) and (b), it could be argued that here there is a similarity between the Australian conception of reasonable belief and the reasonable belief of the accused under this part of the Canadian Criminal Code; the latter Code requires an honest belief, but judged objectively by a hypothetical person acting in the accused's position; the Australian approach, by virtue of *Viro v. The Queen*[10] (which was adopted in *Zecevic*[11]) requires that the accused must be reasonable in his defensive behaviour, but "reasonably believed" here means what the accused himself belief based on all the circumstances in which he found himself. In the former, the law accepts the importance of the accused's interpretation of the situation, and his defensive act is allowed according to that interpretation, but, having accepted that, the law also requires that whatever the accused might honestly have believed must be acceptable to a hypothetical person presumed to be in his position. The latter, on the other hand, suggests that the accused's act be reasonable in the eyes of a hypothetical person presumed to be in his defensive position but, even so, regard is to be had to the accused's belief as to the circumstances which he faced at the time of repelling the attack. It is now abundantly clear that, the purely subjective belief of the accused will not be sufficient to justify his act of defence. It is the belief of the hypothetical reasonable person that in the end decides the legality of the accused's conduct.

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10 [1978-1979] 141 C.L.R. 88.

11 *Supra, fn.* 1.

7.1.1 The question of the origin of the qualified defence

The Australian cases of *R. v. McKay*[12] and *The Queen v. Howe*[13] have always been referred to as the two main sources for the earliest development of the doctrine is concerned. Lowe J., in delivering the judgement of the Supreme Court of Victoria in *R. v. McKay*, laid down the law of self-defence as:

"if the occasion warrants action in self-defence or for the prevention of felony or the apprehension of the felon, but the person taking action acts beyond the necessity of the occasion and kills the offender, the crime is manslaughter not murder."[14]

This bald statement in the law of self-defence was intended to be limited in its scope by the Australian High Court in the case of *R. v. Howe*, in which it was stated:

". . . a person who is subjected to a violent and felonious attack and who, in endeavouring, by way of self-defence, to prevent the consummation of that attack by force exercises more force than a reasonable man would consider necessary in the circumstances, but no more force than he honestly believes to be necessary in the circumstances, is guilty of manslaughter and not of murder."[15]

In contrast to the application of excessive defence in *McKay*, where the law only requires one to believe that a situation warrants him to use some force in self-defence, and even if it was excessive, the accused would be held guilty of manslaughter, according to *Howe*, a person may only be allowed to use force in his

12 [1957] V.R 560.

13 [1958] 100 C.L.R. 448.

14 *R. v. McKay*, *supra*, fn. 12 at p. 563.

15 *R. v. Howe*, *supra*, fn. 13 at p. 456.

defensive act against his attacker if the attack is so violent in its nature that the accused believes his life will be seriously endangered.

One point to be stressed here is that the decisions elucidating the doctrine of excessive defence in those two cases were based mostly on the old English cases.[16] It is interesting to observe that those cases however were not dealing specifically with the case where an accused was convicted of manslaughter as a result of an excess of force used in his defensive behaviour. Those authorities only provide an indication that the middle ground principle had once been applied and accepted by the courts.

One point that has not been highlighted in most of the works concerning the development of the doctrine is the fact that in *Howe*, the Australian High Court had specifically referred to the case of *R. v. Barilla*,[17] which was decided in 1944. Unlike the old English cases discussed earlier, this Canadian case directly dealt with the doctrine of excessive self-defence - an accused person was convicted of manslaughter only on the basis that his act of defence was greater than what was supposed to be required. This is exactly the principle adopted in *Howe*.

At this juncture the point to be stressed is that in discussing the earliest cases on the doctrine of excessive self-defence, there seems to be no solid reason to disregard the importance of *R. v. Barilla*. The Canadian case certainly had applied the doctrine some thirteen years before it was observed in *McKay* and adopted in *Howe*. The only possible reason not to refer to Canadian cases in any discussion on excessive defence is the fact that the doctrine itself has not been developed in an interesting way in Canada as it was in Australia.

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16 Those cases were discussed earlier in chapter two at p.10-16 under the sub-heading of "The origin of the defence and its development."

17 [1944] 4 D.L.R. 344.

Finally, in Australia, Mason C.J. in his judgement in the Australian Court of Appeal case of *Zecevic*[18] concluded that the formulations intended to be directed to the jury whenever dealing with an issue involving the defence of self-defence are too complex and difficult to be readily comprehended. For this simple reason, the doctrine has since been abandoned without any serious effort at its revival even by Mason C.J., whose formulations are responsible for its demise.

In Canada, by virtue of *Brisson v. The Queen*,[19] the doctrine has been said not to be in accord with the law stipulated in the Canadian Criminal Code. The Canadian Supreme Court has since followed this conviction against the doctrine in subsequent cases. In England and Wales, the doctrine has never been recognised but, it has to be said that in the light of the case of *R. v. Clegg*,[20] the main obstacle to the doctrine is the absence of any legislation in support of its introduction.

These are the explanations which have been given for the doctrine's failure even though Mason C.J. in the High Court of Australia in *Zecevic*, the Canadian Supreme Court in *Brisson v. The Queen*,[21] *R. v. Gee*[22] and *R. v. Faid*[23] as well as the House of Lords in *R. v. Clegg*[24] had all admitted the attractiveness of the essential idea of the defence of excessive force in self-defence.

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18 *Supra*, fn. 1.

19 *Supra* fn. 6.

20 *Supra*, fn. 5.

21 *Supra*, fn. 6.

22 *Supra*, fn. 7.

23 *Supra*, fn. 8.

24 *Supra*, fn. 5.

7.2 SELF-DEFENCE AND THE THEORY OF THE BATTERED WOMAN SYNDROME

7.2.1 The theory of the battered woman syndrome in English courts

The theory of the battered woman syndrome, which requires a consideration of the mental condition of the battered woman accused at the time of committing the offence, was discussed quite extensively in the case of *R. v. Ahluwalia*,[25] where the theory helped to substantiate the defence of the diminished responsibility. This judgement of the Court of Appeal was acclaimed as the beginning of the acceptance of the theory in the English courts.

Some three years after the judgement was made, the Court of Appeal in 1995 in the case of *R. v. Thornton (No 2)*[26] again reaffirmed its previous decision and ordered a new trial for a battered woman accused on the ground that the appellant's mental condition was not satisfactorily considered, and thus to reach a decision without reference to the appellant's psychological state of mind would be unjust and unsafe. In the retrial of the case, evidence as to the theory played a major role in having the appellant's conviction reduced to manslaughter.

At that stage the impact of the theory in English courts was that the mental abnormality of the accused is a relevant characteristic for the purpose of the objective test in the law of provocation. However, the Privy Council's decision of *Luc Thiet Thuan*,[27] an appeal case from Hong Kong, took the view that in determining the

25 [1991] 4 All ER 889.

26 [1996] 2 All ER 1023.

27 [1996] 2 All ER 1032.

objective standard of the accused's belief, no special consideration is to be given to any special characteristic possessed by the accused at the time of committing the criminal act. An objective test is purely objective standard based on a hypothetical reasonable ordinary person and not on a hypothetical person having the same characteristics as the accused.

The defence set up by the appellant in *Luc*[28] was one of provocation, hence whether or not it will later effect the claim of other defences, especially the defence of diminished responsibility and also the defence of self-defence, would be a matter of conjecture. However, it might be said that the issue of the belief of the accused in the criminal law defences is inter-related between the various defences and therefore it is probable that the same judgement would affect the objective reasonableness test in other defences. On the issue of whether or not the Privy Council's decision in *Luc* will influence the attitude of the English courts, it might be pointed out that as the case of *Palmer v. R.*.[29] (a Jamaican case) was influential in the English courts on the issue of necessary self-defence, and as the case of *Beckford v. R.*[30] (another Jamaican case) was widely referred to in the determination of the question of the accused's belief in the existence of an attack in the law of self-defence, there is no reason why the present case could not have a similar effect in the English courts.

One point which is clear as far as the theory of the battered woman syndrome in English courts is concerned is that the English concept of the syndrome is one of mental impairment or abnormality. This may be contrasted with the view taken in other jurisdictions where the syndrome is seen as a mental state which normal people might possess. Until now, there has been no reported case where a battered woman

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28 *Ibid.*

29 *Supra*, fn. 2.

30 [1987] 3 W.L.R. 611, [1987] 3 All ER 8.

who has killed her partner has attempted to set-up the defence of self-defence as the principle ground of defence. It would be interesting to see the outcome of such a case where self-defence is the main defence put forward by a battered woman accused. This is more so if one were to look back at the essence of a successful claims of self-defence in English courts. In this context, reference to two cases would be inevitable: firstly the case of *Palmer v. R.*.[31] which underlined the concept of necessary self-defence in English criminal law, and secondly, the Criminal Court of Appeal decision in *Gladstone Williams*[32] which suggested the theory of subjective reasonableness in the accused's belief at the time warranted the taking of necessary action in self-defence.

Now, when the law requires that the accused have a purely honest belief in the necessity to take self-defensive action, would this requirement not, in a way, serve well the case of a battered woman who kills her violent husband? Perhaps, at this stage, if the court is satisfied that she honestly believed that her life would be in danger if she were not to take action, she has at least satisfied the test of the necessity of taking action in self-defence. The case would then be decided on the aspect of the reasonableness of the quantum of defensive force employed in the defence. But again it has to be stressed that her action would be acceptable as one that falls within the ambit of self-defence. To add strength to the accused's case at this point, perhaps the stressful relation with the deceased, coupled with evidence of battering incidents would help to authenticate her fear of being killed. The battering story would not be regarded as a syndrome which is a manifestation of mental abnormality, rather, the actual traumatic experience of the battered woman demonstrates the battered woman accused's honest belief of the need to take pre-emptive action to save her live. Thus not only does it dispel the myth that a battered woman is a mentally impaired person,

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31 *Supra*, fn. 2.

32 [1984] 78 Cr.App.R. 276.

it could, upon the satisfaction of other requirements of self-defence, lead to an acquittal of the accused.

7.2.2 The theory of the battered woman syndrome in the Australian courts

The modern doctrine of self-defence in Australia is principally developed in two cases, *Viro v. The Queen*,[33] and the case of *Fadil Zecevic*.[34] The law in *Viro* stipulated that for a claim of self-defence to be successful, the jury must satisfy that at the time the killing occurred the accused reasonably believed that an unlawful attack which threatened him with death or serious bodily injury was being or was about to be made, thus, permitting self-defensive conduct on the part of a person whose life is threatened.

In the South Australian Supreme Court's decision in *Morgan v. Colman*,[35] the court paraphrased Mason C.J.'s formulations in *Viro v. The Queen* and in doing so modified the law of self-defence to the effect that even in a situation where no actual attack was on the way, the accused's repelling force could be considered as an instance of self-defence. This decision was later followed in the case of *R. v. Lane*,[36] which was decided in the Supreme Court of Victoria; the employment of force by a person at the time where no actual physical attack is aimed at him would be considered as an act of self-defence.

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33 *Supra,* fn. 10.

34 *Supra*, fn. 1.

35 [1981] 27 S.A.S.R. 334.

36 [1983] 2 V.C.R. 449.

Even though these two cases seemingly extend the prospect of a successful plea of self-defence to a person who exercises force in repelling an attack which was not, strictly speaking, physically directed at him, the fact is, in the context of a battered woman's killing in self-defence, these cases were not strong enough to substantiate the battered woman's claim of self-defence in the manner in which they take the purported defensive action. In the case of *Morgan v. Colman*,[37] the reason is because the case itself did not involve a charge of murder, whereas in most battered woman cases, the woman accused was charged after killing the abusive partner. In the case of *R. v. Lane*,[38] the fact on which the appellant killed his purported attacker was different from that of the battered woman. In *R. v. Lane*, the accused killed at the time when the purported attacker was already behaving violently, though it is admitted that no direct assault had yet been made on the accused. On the other hand in most murder cases involving a battered woman, the battered woman kills her partner during a lull in the violence.

The formulation in *Viro v. The Queen*,[39] after being strongly criticised by both bench and bar, were ultimately abandoned and refined in the case of *Fadil Zecevic*.[40] The law as expressed by Mason C.J. conformed to the law in the United Kingdom, especially to the Privy Council's decision in *Palmer v. R*.[41] The law is thus based on the necessity to defend. The fundamental focus will thus be on the reasonable belief of the accused that it was necessary to defend her life in the manner in which he had exercised her defence. If the jury is satisfied that the accused had reasonably believed, in the circumstances in which he found himself, that the way he

37 *Supra*, fn. 35.

38 *Supra*, fn. 36.

39 *Supra*, fn. 10.

40 *Supra*, fn. 1.

41 *Supra*, fn. 2.

or she exercised the right to defend was the most appropriate way in their defensive action, this would be a good ground for a successful claim of self-defence.

The introduction of the battered woman syndrome in the Australian courts was successfully made some four years after the decision in *Zecevic*. This was made however not on the basis of supporting the battered woman's claim of self-defence but rather on the defence of duress. Nevertheless the South Australian Criminal Court of Appeal had indicated in its judgment that the same theory could also be adduced explaining the state of mind of the accused in a case involving the claim of self-defence. The dictum of King C.J. in the case of *Olga Rujanjic and Eriika Kontinnen*[42] was taken seriously and applied in the case of *Kontinnen*[43] which was decided in the Supreme Court of South Australia. The judgement had therefore essentially pronounced that the evidence of battered woman syndrome is potentially relevant to the battered woman's subjective view of necessity to kill the deceased, and that it would be equally relevant to the objective standard of the reasonableness of the battered woman's claimed apprehension of death or serious bodily harm.

In the Australian state of the Northern Territory, in a case where a battered woman shot dead her husband for fear of her own safety, the judge approach the case in a completely different manner.[44] By referring to the provision on the law of self-defence which was stipulated in section 28 (f) of the Criminal Code, the judges took the view that the paramount issue to be solved is whether the battered woman in this case was defending herself against an assault from the deceased at the time of the claimed act of self-defence. This necessarily lead to a discussion on the meaning of "assault" as intended by the Code.

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42 (1991) 53 A.Crim.R. 362.

43 (1991) 16 Crim.L.J. 366.

44 The case of *R v. Helen Patricia Secretary* (1996) 107 N.T.R. (n.p. Lexis Transcript)

The Supreme Court finally concluded that a death threat by the deceased amounted to an assault by virtue of the fact that he had a history of abuse and violence against the accused, and that this also showed that his ultimate purpose to kill the accused was real and well grounded. Therefore, even though at the time when the fatal shot was fired the deceased was asleep, this did not vitiate the accused's claim of self-defence. The deceased's temporary inability to behave violently was not a reason to prevent the accused from claiming self-defence.

It would be interesting to see whether the judgement by the Supreme court of the Northern Territory on this issue will have any legal impact on the Australian states still employing the common law. As it is now, it seems likely that battered women who kill their partners will have the benefit of the theory in assisting their claim that the killing was merely for self-defence. This, however, is far from saying that the battered woman in the Code states is less fortunate. The judgement in *Secretary's* case proved that a battered woman could still have their claim of self-defence considered without any reference to the battered woman syndrome.

7.2.3 The theory of the battered woman syndrome in *R. v. Lavallee:* The final analysis

So far as it can be traced , the case of *R. v. Lavallee*[45] is the first case where Lenore Walker's work on the theory of battered woman syndrome was put into practice. Expert evidence explaining the mental condition of the battered woman at the time she killed her husband was decisive. In this case, this testimony proved that the appellant (the battered woman accused) was suffering from the battered woman

45 [1990] 1 S.C.R. 852.

syndrome and that the theory necessarily explains the reasonableness of her act at the time of pulling the trigger.

The judgement of Supreme Court of Canada was marked as a turning point in the history of a woman in court pleading self-defence after killing her violent partner. The judgement has evidently been influential in the courts in other jurisdictions. In English courts, the cases of *R. v. Ahluwalia*[46] and *R. v. Thornton (No 2)*[47] have to a certain extent benefitted from the theory. In Australia, the case of *Olga Rujanjic and Eriika Kontinnen*[48] in the South Australian Court of Criminal Appeal, the case of *Kontinnen*[49] in the Supreme Court of South Australia, and the case of *Hickey*[50] in the New South Wale Supreme Court all adopted the theory.

As was mentioned in the previous chapter,[51] the difficulty in a battered woman's case is the fact that she has actually taken a life. The incorporation of the theory of the battered woman syndrome in the defence of self-defence, which could lead to a complete acquittal of the woman accused, would be welcome by feminists and others who are sympathetic to the plight of battered women. But the law is not something to be articulated emotionally and sentimentally. When a battered woman kills her husband, she has committed an offence but at the same time she had also suffered from violent behaviour on the part of her victim. An argument could be put forward, and could indeed be rightly put forward, that it is a matter of who kills first. If no decisive action is taken by the battered woman she could end up losing her own

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46 *Supra*, fn. 25.

47 *Supra*, fn. 26.

48 *Supra*, fn. 42.

49 *Supra*, fn. 43.

50 (1992) 16 Crim.L.J. 271.

51 Chapter 5.

REFERENCES

Alldridge, P., "*Mistake In Criminal Law-Subjectivism Reasserted in the Court of Appeal*" (1984) Northern Ireland Law Quarterly 263.

Alldridge, P., "*The Coherence of Defences*" [1983] Criminal Law Review 665.

Allen, M.J., "*Textbook in Criminal Law*" 3rd ed. (1995). London, Blackstone Press.

Allsop, J., G.M. Gregg, "*Privy Council Decisions in Australia: The Law of Excessive Force in Self-Defence*" (1979) 8 Sydney Law Review 731.

Appel, S.D., "*Beyond Self-Defense: The Use of Battered Woman Syndrome in Duress Defenses*" [1994] University of Illinois Law Review 955.

Ashworth, A., "*Self-Defence and the Right to Life*"[1974] 34 Cambridge Law Journal 282.

Ashworth, A., "*Principles of Criminal Law*" (1991). Oxford, Clarendon Press.

Ashworth, A., "*Liability for Carrying Offensive Weapons*" [1976] Criminal Law Review 725.

Bates, F., "*Expert Witnesses and Battered Woman - The Lighthouse Flashes!*" (1994) 58 (1) Journal of Criminal Law 85.

Beale, J.H., "*Homicide in Self-Defence*" (1903) 3 Columbia Law Review 526.

Beale, J.H., "*Retreat from a Murderous Assault*" [1902] 16 Harvard Law Review 567.

Boyle, C., "*Battered Wife Syndrome and Self-Defence: Lavallee v. R.*" [1990] 9 Canadian Journal of Family Law 171.

Brett, P., P. Louis, "*Criminal Law*" Text and Cases, 4th ed. (1978). Melbourne, Butterworths.

Brodsky, D.J., "*Educating Juries: The Battered Woman Defence in Canada*" (1987) 25 Alberta Law Review 461.

Brookbanks, W.J., "*Self-Defence in New Zealand*" [1989] New Zealand Law Journal 258.

Callahan, A.R., "*Will the "Real" Battered Woman Please Stand Up? In Search of a Realistic Legal Definition of Battered Woman Syndrome*" [1994] 3 American University of Gender and the Law 117.

Cards, R.J., P. Asterly, "*Criminal Law*" 12th ed. (1992). London, Butterworths.

Cipparone, R.C., "*The Defence of Battered Women Who Kill*" [1987] 135 University of Pennsylvania Law Review 427.

Clarkson, C.M.V., H.M. Keating, "*Criminal Law*" Text and Materials, 3rd ed. (1994). London, Sweet and Maxwell.

Crocker, P., "*The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*" (1985) 8 Harvard Women's Law Journal 121.

Donovan, D.A., S.M. Wildman, "*Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation*" [1981] 14 Loyola of Los Angeles Law Review 435.

Doran, S., *The Doctrine of Excessive Defence: Developments Past, Present and Potential*" (1985) 36 Northern Ireland Law Quarterly 314.

Dowd, M., "*Dispelling the Myths About the "Battered Woman's Defense:" Towards a New Understanding*" [1992] 19 Fordham Urban Law Journal 567.

Edwards, E.J., R.W. Harding, I.G. Campbell "*The Criminal Codes*" 4th ed. (1992). Sydney, Law Book Co.

Edwards, S., "*Battered Women Who Kill*" (1990) 140 (6474) New Law Journal 1380.

Edwards, S., "*Battered Woman Syndrome*" (1992) 142 (6570) New Law Journal 1350.

Edwards, S., "*The Justice of Retrial?*" (1996) 146 (6747) New Law Journal 857.

Elliott, D.W., J.C. Wood, "*A Casebook on Criminal Law*" 2nd ed. (1969). London, Sweet & Maxwell.

Elliott, I.D., "*Excessive Self-Defence in Commonwealth Law: A Comment*" (1973) 22 International Comparative Law Quarterly 727.

Faigman, D.L., "*The Battered Woman Syndrome and Self-Defence: A Legal and Empirical Dissent*" (1986) 72 Virginia Law Review 619.

Faigman, D.L., "*Discerning Justice When Battered Women Kill*" [1987] 37 Hastings Law Journal 207.

Fairall, P.A., "*The Demise of Excessive Self-Defence Manslaughter in Australia: A Final Obituary?*" (1988) 12 Criminal Law Journal 28.

Fisse, B., "*Howard's Criminal Law*" 5th ed. (1990). North Ryde, N.S.W., Law Book Co. Ltd.

Fletcher, G.P., "*Rethinking Criminal Law*" (1978). Little, Brown & Company.

Gilles, M., "*Self-Defence and Mistake: A Way Forward*" [1990] 53 Modern Law Review 187.

Gillies, P., "*Criminal Law*" 3rd ed. (1993). North Ryde, N.S.W., Law Book Company.

Gold, A.D., "*Manslaughter and Excessive Self-Defence*" (1981) 28 C.R.N.S. 263.

Harlow, C., "*Self-Defence: Public Right or Private Privilege*" [1974] Criminal Law Review 528.

Harris, S.F., "*Harris's Criminal Law*" 21st ed. (1968). London, Sweet and Maxwell.

Hay, M.A., "*The Criminal Law of private Defence in England, Scotland and France*" (1987). Thesis (Ph.D.) University of Edinburgh.

Heaton, R., "*Criminal Law*" Cases and Materials, (1996). London, Blackstone Press.

Horder, J., "*Redrawing the Boundaries of Self-Defence*" (1995) 58 Modern Law Review 431.

Howard, C., "*An Australian Letter-Excessive Defence*" [1964] Criminal Law Review 448.

Howard, C., "*Two Problems in excessive Defence*" [1968] 84 Law Quarterly Review 343.

Howard, C., "*Australian Criminal Law*" 2nd ed. (1970). Melbourne, Law Book Co.

James, C., "*The Queensbury Rule of Self-Defence*" (1972) 21 International Comparative Law Quarterly 357.

Kadish, S.H., "*Respect for Life and Regard for Rights in the Criminal Law*" (1976) 64 California Law Review 871.

Kinports, K., "*Defending Battered Women's Self-Defense Claims*" [1988] 67 Oregon Law Journal 393.

Lanham, D., "*Killing The Fleeing Offender*" [1977] 1 Criminal law Journal 16.

Lanham, D., "*Death of a Qualified Defence?*" (1988) 104 Law Quarterly Review 239.

Leigh, L.H., "*Manslaughter and the Limits of Self-Defence*" (1971) 34 Modern Law Review 685.

Maguigan, H., "*Battered Woman and Self-Defence: Myths and Misconceptions in Current Reform Proposals*" (1991) 140 University of Pennsylvania Law Review 379.

Manson, A., "*Excessive Force in the Supreme Court of Canada. A comment on Brisson and Gee*" (1982) 29 Criminal Reports (3d) 364.

Martinson, D., M. McCrimmon, I. Grant, C. Boyle, "*A Forum on Lavallee v. R.: Women and Self Defence*" (1991) 25 University of British Columbia Law Review 23.

Martinson, D., "*Lavallee v. R. - The Supreme Court of Canada Addresses Gender Bias in the Courts*" (1990) 24 University of British Columbia law Review 381.

Mather, V.M., "*The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense, and Expert Testimony*" [1988] 39 Mercer Law Review 545.

McAuley, F., "*Beckford and the Criminal Law Defences*" 41 Northern Ireland Legal Quarterly 158.

McCall Smith, A, D. Sheldon, "*Scots Criminal Law*" (1992). Edinburgh, Butterworths.

McColgan, A., "*In Defence of Battered Women Who Kill*" (1993) 13 Oxford Journal of Legal Studies 508.

McSherry, B., "*Self-Defence and Provocation*" [1992] 66 Law Institute Journal 151.

Mewett, A. M., M. Manning, "*Criminal Law*" 2nd ed. (1985). Butterworths & Co. (Canada) Ltd.

Morris, N., "*The Slain Chicken Thief*" (1988) 2 Sydney Law Review 414.

Morris, N., C. Howard, "*Studies in Criminal Law*" (1964). Oxford, Clarendon Press.

Nicolson, D., R. Sanghvi, "*Battered Women and Provocation: The Implications of R. v. Ahluwalia*" [1993] Criminal Law Review 728.

O'Brien, N.C., "*Excessive Self-Defence: A Need for Legislation*" (1983) 25 Criminal Law Quarterly 441.

O'Connor, D., P.A. Fairall, "*Criminal Defences*" 2nd ed. (1988). Sydney, Butterworths.

O'Donovan, K., "*Defences for Battered Women Who Kill*" [1991] 18 Journal of Law and Society 219.

Padfield, N., "*Manslaughter: The Dilemma Facing the Law Reformer*" (1995) 59 Journal of Criminal Law 291.

Parish, S., "*Self-Defence: the Wrong Direction*" [1997] Criminal Law Review.

Podebradsky, S., M.E. Triaggiano-Hunt, "*An Overview of Defense of Battered Women from a Postconviction Perspective*" [1988] 4 Wisconsin Women's Law Journal 95.

Reed, A., "*Self-Defence-Applying the Objective Approach to Reasonable Force*" [1996] 60 Journal of Criminal Law 94.

Reville, N.J., "*Self-Defence: Courting Sober but Unreasonable Mistakes of Fact*" (1988) 52 Journal of Criminal Law 84.

Robinson, P.H., "*Criminal Law Defenses: A Systematic Analysis*" [1982] 82 Columbia Law Review 199.

Rosen, R.A., "*On Self-Defense, Imminence, and Women Who Kill Their Batterers*" [1993] 71 North Carolina Law Review 371.

Samuel, A., "*Excessive Self-Defence-A missed Opportunity*" (1971) 121 New Law Journal 669.

Sanghvi, N., D. Nicolson, "*More Justice for Battered Woman*" (1996) 146 (6747) New Law Journal 1122.

Schneider, E.M., "*Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*" [1980] 15 Harvard Civil Rights-Civil Liberties Law Review 623.

Schneider, E.M., "*Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*" [1992] 14 Women's Rights Law Reporter 213.

Schwab, E., "*The Quest for the Reasonable Man*" [1982] 45 Texas Bar Journal 178.

Sheehy, E.A., J. Stubbs, J. Tolmie, "*Defending Battered Women on Trial: The Battered Woman Syndrome and its limitation*" (1992) 16 Criminal Law Journal 369.

Singer, R., "*The Resurgence of Mens Rea: II-Honest but Unreasonable Mistake of Fact in Self-Defense*" (1987) 28 Boston College Law Review 459.

Smith, J.C., B. Hogan, "*Criminal Law*" 8th ed. (1996). London, Butterworths.

Smith, J.C., B. Hogan, "*Criminal Law*" Cases and Materials, 3rd ed. (1986). London, Butterworths.

Smith, J.C., "*Criminal Law*" Essays in Honour of J.C. Smith, Edited by P. Smith. (1987) London, Butterwoths.

Smith, P., "*Excessive Defence - a Rejection of Australian Initiative?*" [1972]Criminal Law Review 524.

Snelling, H.A., "*Killing in Self-Defence*" (1960) 34 Australian Law Journal 130.

Sornarajah, M., "*Excessive Self-Defence in Commonwealth Law*" [1972] 21 International Comparative Law Quarterly 758.

Sornarajah, M., "*Excessive Self-Defence Under the Australian Criminal Codes*" (1982) 7 University of Tasmania Law Review 156.

Steele, W.W., C.W. Sigman, "*Re-examining the Doctrine of Self Defense to Accommodate Battered Women*" [1991] 18 American Journal of Criminal Law 169.

Stell, L.K., "*Close Encounters of the Lethal Kind: The Use of deadly Force in Self-Defence*" (1986) 49 Law and Contemporary Problems 113.

Stuart, D., "*Canadian Criminal Law*" 2nd ed. (1987). Toronto, Carswell Company Limited.

Stuesser, L., "*The "Defence" of "Battered Woman Syndrome" in Canada*" (1990) 19 Manitoba Law Journal 195.

Talbot, J.Z., "*Is "Psychological Self-Defense" A Solution to the Problem of Defending Battered Women Who Kill?*" [1988] 45 Washington and Lee Law Review 1527.

Thyfault, R.K., "*Self-Defense: Battered Woman Syndrome on Trial*" [1984] 20 California Western Law Review 485.

Turner, J., "*Russel on Crime*" 12th ed. (1964). London, Steven & Sons.

Walker, L., "*The Battered Woman*" (1979). Harper & Row.

Walker, L., "*The Battered Woman Syndrome*" (1984). Springer.

Wasik, M., "*Partial Excuses in the Criminal Law*" [1982] 45 Modern Law Review 516.

Wells, C., "*Domestic Violence and Self-Defence*" (1990) 140 New Law Journal 127.

Wells, C., "*Battered Woman Syndrome and Defences to Homicide: Where Now?*" (1994) 14 Legal Studies 266.

White, S., "*Excessive Force in Self-Defence*" (1971) 34 Modern Law Review 106.

Williams, G., "*Offences and Defences*" [1982] 2 Legal Studies 233.

Williams, G., "*Textbook of Criminal Law*" 2nd ed. (1983). London, Steven & Sons.

Williams, G., "*Criminal Law*" The General Part, 2nd ed. (1961). London, Steven & Sons.

Willoughby, M.J., "*Rendering Each Woman Her Due: Can a Battered Woman Claim Self-Defense When She Kills Her Sleeping Batterer?*" [1989] 38 Kansas Law Review 170.

Wright, F.M., "*Self-Defence and the Classifications of Defences*" [1992] 7 Auckland University Law Review 127.

Finkel, N.J., K.H. Meister, D.M. Lightfoot, "T*he Self-Defense Defense and Community Sentiment*" [1991] 15 Law and Human Behaviour 585.

Yeo, S.M.H., "*Proportionality in Criminal Law*" (1988) 12 Criminal Law Journal 211.

Yeo, S.M.H., "*The Demise of Excessive Self-Defence in Australia*" (1988) 37 International Comparative Law Quarterly 348.

Yeo, S.M.H., "*New Developments in the Law of Self-Defence in Australia*" (1987) 7 Oxford Journal of Legal Studies 489.

Yeo, S.M.H., "*The Element of Belief in Self-Defence*" [1989] 12 Sydney Law Review 132.

Yeo, S.M.H., "*Self-Defence: from Viro to Zecevic*" (1988) 4 Australian Bar Review 251.

Yeo, S.M.H., "*Battered Woman Syndrome in Australia*" (1993) 143 (6582) New Law Journal 13.

Yeo, S.M.H., "*Provocation Down Under*" (1991) 141 New Law Journal 1200.

Yeo, S.M.H., "*Compulsion in The Criminal Law*" (1990). Sydney, Law Book Co.